83-921

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

No.

THE COMMONWEALTH NATIONAL BANK,
Petitioner

v.

CHARLES E. ASHE and SUSAN J. ASHE, ET AL,

Respondents

THE UNITED STATES OF AMERICA, Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a lien on real estate which arises upon the filing of a promissory Note contractually authorizing the confession of a judgment and executed in connection with a loan transaction is a judicial lien subject to avoidance under Section 522(f)(1) of the Bankruptcy Code of 1978. No.

2. Whether a statute which retroactively impairs a creditor's lien on real property granted as security in a loan transaction

creates a substantial question of constitutionality as a deprivation of property without due process of law, and therefore should be retrospectively applied. No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE COMMONWEALTH NATIONAL BANK, Petitioner

v.

CHARLES E. ASHE and SUSAN J. ASHE
t/a C&S FUEL SERVICE, et al., Respondents*

PETITION FOR A WRIT OF CERTIORARI
FROM UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The Commonwealth National Bank, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

*Robert G. Dobalaw and Lynnore W. Dobalaw, Aaron Franklin and Anna Mary Burkholder Paul S. Bosworth and Mabel G. Bosworth

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (App. A, infra. 16a-29a) presented for review is reported at 712 F.2d 864 (1983). That Opinion dealt with three appeals from the Bankruptcy Court in the Eastern District of Pennsylvania which were consolidated by that Court with In re Ashe, which was remanded by this Honorable Supreme Court in light of United States v. Security Industrial Bank, 459 U.S. 922, 103 S. Ct. 407 (1982) (App. C, infra. 43a). In Re Ashe, 669 F.2d 105 (1982) pet. writ cert.

granted and remanded to 3d Cir., 103 S. Ct. 563, 74 L.Ed. 2d 927 (1982) (App. C infra. 43a). The Opinion of the Bankruptcy Court for the Middle District of Pennsylvania in In re Ashe is reported at 10 B.R. 97 (M.D. Pa. 1981), (App. B infra. 39a-42a). The Opinion of the Bankruptcy Court for the Eastern District of Pennsylvania in Burkholder is reported at 11 B.R. 346 (Bankr. E.D. Pa. 1981)(App. B infra. 33a). The Opinion of the Bankruptcy Court for the Eastern District of Pennsylvania in Dobslaw is reported 20 B.R. 922 (Bankr. E.D. Pa. 1982),(App. B infra. 35a-36a). The Opinion of the Bankruptcy Court in Bosworth is not

reported. (App. B infra. at 35a-36a)

JURISDICTION

The judgment of the Court of Appeals (App. B., infra, 15a) was entered on July 8, 1983. A Petition for Rehearing was denied on August 3, 1983, by the Court with four out of ten Judges voting to grant the Petition (App. A., infra. 30a-32a).

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, codified at 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part as follows:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

2. Section 522(f) of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549, 11 U.S.C. 522(f), provides in relevant part as follows:

> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs exemption to which the debtor would have been entitled under subsect-

ion (b) of this section, if such lien is -

(1) a judicial lien;

(2) a nonpossessory, non-purchase-money security interest in any -

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor; or

(c) professionally prescribed health aids for the debtor or a dependent of the debtor."

3. Section 522(d)(1) of the Bankruptcy Reform Act of 1978, Pub. L. 95 598, 92 Stat. 2549, 11 U.S.C. 522(d)(1) provides as follows:

> "(1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor."

4. The Constitutionality of the Bankruptcy Code of 1978 is in question and therefore 28 U.S.C.

2403(a) may be applicable.

STATEMENT OF THE CASE

The Petitioner, The Commonwealth National Bank, holds a valid and enforceable lien upon the residential properties of the Respondents in these consolidated cases, Charles E. Ashe and Susan J. Ashe t/a C&S Fuel Service; Robert G. and Lynnore W. Dobslaw, individually and t/a VIDEO PL; Aaron Franklin Burkholder and Anna Mary Burkholder; and Paul S. Bosworth and Mabel G. Bosworth ("Debtors"). These actions arose when the Debtors sought to avoid the The Commonwealth

National Bank's liens pursuant to Section 522(f)(1) of The Bankruptcy Reform Act of 1978 ("1978 Act") Pub. L. 95-598, November 6, 1978, 92 Stat. 2549, 11 U.S.C. 522(f)(1). This section allows a debtor to avoid a judicial lien to the extent the lien impairs an exemption on debtor's property to which he otherwise would have been entitled.

In each case the Debtors were individuals, husband and wife, who instituted bankruptcy proceedings under the 1978 Act. In each case, the liens encumbering the Debtors' property exceeded its value and the Debtors claimed joint "homestead" exemptions thereon in the amount of

Fifteen Thousand and 00/100 ($15,000.00) Dollars. The Petitioner, The Commonwealth National Bank, had loaned the Debtors money and obtained as collateral a lien on their real estate pursuant to Notes which contractually authorized the entry of judgment. The Debtors sought to avoid The Commonwealth National Bank's liens to which it objected on the basis that (a) the Debtors had no equity in their residence upon which to claim their joint exemptions; (b) the Commonwealth National Bank's liens are not judicial lien subject to avoidance; and (c) the Commonwealth National

Bank's lien, security for its loan, could not be Constitutionally retroactively avoided.

The Bankruptcy Court of the Eastern District of Pennsylvania in the cases of Dobslaw, Burkholder, and Bosworth, and the Bankruptcy Court of the Middle District of Pennsylvania in Ashe having jurisdiction of the matter pursuant to 28 U.S.C. 1471, held separate hearings on the Debtors' Petitions to Avoid The Commonwealth National Bank's lien and a Stipulation of Facts were entered into by counsel for the parties in each case.

In the cases of Ashe and

Bosworth, the Notes were filed prior to the enactment date of the 1978 Act. In Ashe, because of the Debtor's default, execution proceedings pursuant to the judgment had been commenced prior to the effective date of the 1978 Act.

In Burkholder, the Note was filed in the "gap period" between the enactment and effective date of the 1978 Act.

In Dobslaw the Guaranty Agreement and Note were filed after the effective date of the Act and the only issue in that case is whether a lien which arises from the filing of a Note and/or Guaranty Agreement is a "judicial lien"

within the purview of 11 U.S.C. 522(f)(1).

The Bankruptcy Courts held that The Commonwealth National Bank's lien was a "judicial lien" and that Section 522(f)(1) of the Bankruptcy Code could constitutionally be retroactively applied to avoid such liens. (App. B infra pp. 23a - 42a)

By agreement of the parties, direct appeals were taken to the Third Circuit Court of Appeals, pursuant to the 1978 Act. The appeals of the Burkholder, Bosworth and Dobslaw cases were consolidated by the Court with Ashe upon rehearing of Ashe by that Court pursuant to this Honorable Court's

vacating of the Third Circuit 's prior decision in Ashe, and remanded in light of Security Industrial Bank, 459 U.S. 922, 103 S. Ct. 407 (1982), which held Section 522(f)(2) of the 1978 Act could not be retrospectively applied to avoid pre-Act liens.

On appeal, a three-judge panel of the Third Circuit Court of Appeals affirmed their prior decision in Ashe and those of the Eastern District Bankruptcy Court, despite the unanimous judgment of this Honorable Court in Security Industrial Bank, supra and despite this Court's specific directive to consider its Opinion in Security

Industrial Bank.

REASONS FOR GRANTING THE PETITION

1. Conflict with Recent Decision of this Court. The decision of the Third Circuit is in direct conflict with and contrary to this Court's unanimous judgment in United States v. Security Industrial Bank, 459 U.S. 922, 103 S. Ct. 407 (1982).

The Third Circuit in the Opinion below held that a lien on all Debtor's real property in the county in which the judgment had been entered was not a property right entitled to constitutional

protection despite this Court's holding in Security Industrial Bank, supra, that a non-specific lien on personal property was such a property interest.

Despite this Court's specific Remand Order in Ashe, the Court below disregards this Court's Opinion in Security Industrial Bank, supra, which limited attention is pointed out by the dissenting opinion below. (See App. A infra, pp. 16a - 29a).

2. Conflict with other Circuit Decisions. The Third Circuit Court of Appeals' decision in this case is in conflict with: (a) the decisions of the Ninth Circuit Court of

Appeals in In Re: DeBose, 16 B.R. 881, 8 B.C.D 953 (9th Cir. 1982) which held it would not retroactively apply 522(f)(1) to pre-Act liens because of this Court's holding in Security Industrial Bank; (b) the Eleventh Circuit Court of Appeals in First National Bank & Trust Co. v. Daniel, 701 F.2d 141 (1983), which held Section 522(f) of the 1978 Act is not retroactive from its date of enactment[1] and (c) the First Circuit which held the 1978 Act would not be retrospectively applied to avoid "gap liens". White v. Gulisian 25 B.R. 339 (1st Cir. 1982).

[1]See also In Re Curry, 698 Fla 298 (6th Cir. 1983)

3. Important Constitutional Question. This case presents an important question of retroactive application of Section 522(f)(1), of the 1978 Act. This Court has held section 522(f)(2) of the Act may not be retrospectively applied to avoid pre-Act liens. Security Indusstrial Bank, supra.

4. Important Constitutional Question Involving Viability of Previous Decision of this Court. Retroactive application of bankruptcy legislation affecting property rights of creditors was recently unanimously held by this Court to raise a substantial question of constitutionality under the Fifth Amendment of the

Constitution of the United States in Security Industrial Bank, supra. This Court held a similar retrospective taking to be unconstitutional in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935). The Radford case remains viable despite the Third Circuit's characterization in this case of Radford as "discredited" and "effectively limited if not tacitly overruled ...", in its first Opinion in this case at 669 F.2d 105 (3d Cir. 1982) See Security Industrial Bank, 103 S. Ct. at 410 to 412.

5. Issue of First Impression Involving Nature of Liens Subject to Avoidance. This case presents an

important question concering whether Congress intended a lien on real property granted as security in a loan transaction pursuant to a Note contractually authorizing the entry of judgment to be a "judicial lien" subject to avoidance under the Bankruptcy Code.

6. Conflict with Applicable Decision of this Court on Interpretation of Federal Law. The Court below erroneously ruled that this Court's denial of certiorari in Pennsylvania Department of Public Welfare v. Gardner, 685 F.2d 106 (3d Cir. 1982), was a holding on the merits of whether or not a filed cognovit note judgment was a

"judicial lien". (See Op, App. A infra pp. 16 - 29a). The refusal of this Court to grant a petition for a writ of certiorari is not as a matter law regarded as an affirmance of such decision which raises it to the dignity of final binding authority and is not a determination of the merits. Becker v. Safelite Glass Corporation, 244 F. Supp. 625 (D. Ky. 1965). This Court denies petitions for certiorari for many reasons and the Gardner petition may have been denied because certiorari had been granted in In Re Ashe raising many of the same issues.

7. Conflict with Applicable Decisions of this Court on

Interpretation of Federal Law Regarding Retroactivity to "Gap Liens".

The Court's opinion below that the lien avoidance Section 522(f) of the 1978 Act may be retroactively applied to avoid post-enactment, pre-effective date "gap" liens is in conflict with this Court's following decisions:

a. Holte v. Henley, 232 U.S. 637, 34 S.Ct. 459 (1914), in which this Court held that the 1910 Bankruptcy statute applied to cases only after its effective date;

b. Security Industrial Bank, 102 S. Ct. at 414, in which this Court refers to the provisions of

the 1978 Act stating its shall apply in all cases after its effective date; and in which, this Court held that in the absence of a clear expression of Congress' intent to apply the lien avoidance section of the 1978 Act to property rights prior to its enactment date, it would not be so construed as that would raise substantial constitutional questions. 103 S. Ct. at 414. Likewise there is no language supporting Congress' intent to retroactively apply Section 522(f)(1) Rather, the language of the Act indicates clearly that it shall be and is effective for all cases commenced after its effective

date. Section 403, Pub L. 95-598, Title IV, Nov. 6, 1978, 92 Stat. 2683.

Important Federal Question. The retroactivity of 11 U.S.C. 522)(f)(1) to gap liens is a question of substantial constitutional import which this Court did not address in Security Industrial Bank, supra.

9. Erroneous Decision on Important Federal Question. The Court below erred in holding Section 67(f) of the prior Bankruptcy Act warranted retroactive application of Section 522(f) of the 1978 Act.

10. Conflict between Decision of Court of Appeals and of Highest State Court on Non-Federal Matter. The Court below erred that under Pennsylvania law, judgment note liens are not property rights. See In Re Fell, 18 Supp. 989 (1937), In Re: Pennsylvania Central Brewing Co., 114 F. 2d 1010 (3rd Cir., 1940); Sajer v. Burgess, 350 F. Supp. 1310, aff'd, 93 S. Ct. 1923, (1927). Under Pennsylvania law, a cognovit Note and cognovit Guaranty Agreement become a lien upon debtor's property in the county when filed in the county prothonotary's office, pursuant to the Judgment Lien Law Act of July 3, 1947, P.L.

1234, 12 P.S. Section 77 et seq.)(current version at 42 Pa. C.S.A. Sections 2737 and 4303).

CONCLUSION

It is respectfully submitted, for the reasons set forth above that the Petiton for Writ of Certiori should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1629

In re: CHARLES E. ASHE AND SUSAN J. ASHE
t/a C & S FUEL SERVICE,
Debtors

THE COMMONWEALTH NATIONAL BANK,
Objector

v.

UNITED STATES OF AMERICA,
Intervenor

The Commonwealth National Bank,
Creditor-Objector,
Appellant

(D.C. Bankruptcy No. 1-79-00882)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(Bankruptcy Court — Wilkes-Barre)

Argued: November 19, 1981

Before: GIBBONS and HIGGINBOTHAM, *Circuit Judges*
and MEANOR, *District Judge**

(Opinion Filed: January 6, 1982)

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*Hon. H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

This appeal presents questions of first impression: the applicability to Pennsylvania cognovit notes of the exemption provision of Section 522(f) of the Bankruptcy Reform Act of 1978, 11 U.S.C. §522(f) (Supp. III 1979); and if that section is applicable to cognovit notes, its constitutionality. The case is before us on appeal from a bankruptcy judge upon agreement of the parties under that Act, Pub. L. No. 95-598, Title IV, §405, 92 Stat. 2685 (1978). The bankruptcy judge held that the lien of a cognovit note was a judgment lien subject to avoidance to the extent permitted by Section 522, and that as applied the section is constitutional. We affirm.

I.

In 1973, Charles E. Ashe and Susan J. Ashe (the Debtors) borrowed $45,287.62 from the Commonwealth National Bank (the Bank). This commercial loan was evidenced by a promissory note containing a confession of judgment clause in the form commonly used in Pennsylvania. The judgment note was duly filed with the Prothonotary's Office of the Court of Common Pleas of Dauphin County. At that time the Debtors owned two

pieces of real estate in Dauphin County, one of which was their residence. The note was refiled in 1978 in the amount of $43,733.47. The loan became delinquent, and on May 30, 1979, the Bank filed a complaint in assumpsit in the Court of Common Pleas of Dauphin County. This action was necessary because under Pennsylvania law, in order to obtain a writ of execution on residential property, a separate action is required in addition to the cognovit note judgment. Judgment in the separate action merges, so that the judgment lien relates back to the date the confessed judgment note was filed.[1] The Bank obtained a default judgment for $54,010.83, and a writ of execution was issued on August 31, 1979. An execution sale was scheduled for October 11, 1979, but on October 10, the Debtors filed a Petition under Chapter 7 of the Bankruptcy Reform Act, 11 U.S.C. §701 et seq. This resulted in a stay of the execution sale.

The Bankruptcy Reform Act provides that ". . . an individual debtor may exempt from property of the estate . . . property that is specified in subsection (d). . . ." 11 U.S.C. §522(b)(1). Subsection (d) permits exemption of

1. "As to any residential real property, a plaintiff shall not have the right to levy, execute or garnish on the basis of any judgment or decree on confession, whether by amicable action or otherwise, or on a note, bond or other instrument in writing confessing judgment until plaintiff, utilizing such procedures as may be provided in the Pennsylvania Rules of Civil Procedure, files an appropriate action and proceeds to judgment or decree against defendant as in any original action. The judgment by confession shall be changed as may be appropriate by a judgment, order or decree entered by the court in the action. After the above mentioned original action has been prosecuted and a judgment obtained, that judgment shall merge with the confessed judgment and the confessed judgment shall be conformed as to amount and execution shall be had on the confessed judgment. The parties to the action shall have the same rights as parties to other original proceedings. Nothing in this act shall prohibit a residential mortgage lender from proceeding by action in mortgage foreclosure in lieu of judgment by confession if the residential mortgage lender so desires." Act of Jan. 30, 1974, P.L. 13, No. 6, §407(a), as amended, Act of Oct. 5, 1978, P.L. 1100, No. 258, §1, Pa. Stat. Ann. tit. 41, §407(a) (Purdon Supp. 1981-82).

"[t]he debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor . . . uses as a residence. . . ." 11 U.S.C. §522(d)(1). The debtors claimed exemptions with respect to their Dauphin County residence in the aggregate amount of $15,000. When their bankruptcy petition was filed the fair market value of the residence did not exceed $50,000, while encumbrances on it listed on their Bankruptcy Schedule A-2 (Creditors Holding Security) totaled $85,244.79. These encumbrances included liens having priority under Pennsylvania law over that of the Bank totaling $9,118.49. Thus the prior encumbrances and the Bank's lien exceeded the fair market value of the residence.

The Bankruptcy Reform Act also provides that "[n]otwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is — (1) a judicial lien. . . ." 11 U.S.C. §522(f)(1). The Bank filed a timely objection to the allowance of the $15,000 exemption insofar as its lien would be impaired, but after a hearing the Bankruptcy Court held that the lien was a judgment lien, avoidable by virtue of Section 522(f)(1). The economic effect of this ruling is to increase interests in the residence having priority over the Bank's lien by $15,000. Thus if an execution sale brought a bid of $50,000 the Bank would recover only $25,881.51, rather than $40,881.51. The Bank contended that if Section 552(f)(1) was so applied, it was unconstitutional. That contention was rejected by the Bankruptcy Court, and this appeal followed.[2]

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2. All Bankruptcy Courts in Pennsylvania which have considered these issues have reached similar conclusions. In re Burkholder, 11 B.R. 346 (Bk. E.D. Pa. 1981); In re Smith, Bk. No. 5-80-00081 (Bk. M.D. Pa. 1980); In re Eminhizer, Bk. No. 1-80-00090 (Bk. M.D. Pa. 1980); In re Natale, 5 B.R. 454 (Bk. E. D. Pa. 1980).

II.

The Bank contends that the court erred in holding that the lien of a cognovit note is a judicial lien within the meaning of Section 522(f)(1). Since a decision in its favor on that question would avoid the necessity for considering the Bank's contention that the law is unconstitutional, we turn to that question first. The term "judicial lien" is defined in the Bankruptcy Reform Act as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. §101(27). The term "lien" is defined as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. §101(28). Thus a "judicial lien" is a charge against or interest in property to secure payment of a debt, obtained by judgment or other legal proceedings. Only such liens are avoidable under Section 522(f)(1). A "security interest", defined as a "lien created by an agreement," 11 U.S.C. §101(37), is not avoidable under that section.[3] Thus a mortgage, for example, is a lien, since it is a charge against or interest in property to secure payment of a debt. It is not, however, affected by Section 522(f)(1) because the charge against or interest in property is created by a conveyance or contract rather than by a judgment or other legal proceeding.

Under Pennsylvania law a confession of judgment for money "may be entered by the prothonotary . . . without the agency of an attorney and without the filing of a complaint, declaration, or confession, for the amount which may appear to be due from the face of the instrument." Pa. Rules Civ. P. 2951(a), 42 Pa. Cons. Stat. Ann. (Purdon 1975).[4] Once entered, the judgment

3. The Bankruptcy Act also recognizes "statutory liens". 11 U.S.C. §101(38), but they are not relevant for purposes of this case.

4. *See generally*, *Goodrich-Amram 2d*, "Confession of Judgment for Money", §§2950:1, et seq.; Shuchman, *Handbook on the Use of Judgment Notes In Pennsylvania (1981)*.

note, as in the case of a litigated judgment, results in a lien upon all real property of the debtor in the county of filing. 42 Pa. Cons. Stat. Ann. §4303 (Purdon 1981); *Scott Factors, Inc. v. Hartley*, 425 Pa. 290, 228 A.2d 887 (1967); *In re Fell*, 18 F. Supp. 989 (E.D. Pa. 1937). Moreover, the priority of such liens is determined by the date they are left for entry by the prothonotary. 42 Pa. Cons. Stat. Ann. §8141 (Purdon Pamph. 1981). As a practical matter, therefore, the taking of a cognovit note in connection with a loan to an owner of real estate serves most of the same functions as a mortgage. The chief difference between the two security devices is that a mortgage requires a conveyance of specific property, while the cognovit note creates a lien on all real property of the debtor in the county, with no need for a description or conveyance. The Bank contends that because cognovit notes are consensual undertakings they should be treated, like mortgages, as "security interests" rather than "judicial liens." But that is equally true of consent judgments settling initially litigated matters. With either, the *lien* is created not by the agreement, but by the judgment. Literally, both a filed cognovit note and a consent judgment fit within the definition of "judicial lien" in 11 U.S.C. §101(27).

When Congress wrote the definition of judicial lien and security interest the cognovit note problem was not unknown. Under prior sections 60 and 61 of the Bankruptcy Act dealing with voidable preferences including liens obtained by judgment, those obtained by confession were considered to be ordinary judgment liens. *See In re Fell*, 18 F. Supp. 989, 991 (E.D. Pa. 1937); *Nogi v. Greenwood*, 1 F. Supp. 60, 62-63 (M.D. Pa. 1932); *In re Albright*, 18 F.2d 591, 592 (E.D. Pa. 1927), *aff'd sub nom. Shick v. Goodman*, 33 F.2d 291 (3d Cir.), *cert. denied*, 280 U.S. 561 (1929); *Greenberger v. Schwartz*, 261 Pa. 265, 104 A. 573 (1918); 4 *Collier on Bankruptcy* 116, ¶67.08 n.1 (14th ed. 1978). Given that background,

and in the absence of any indication in the legislative history of the Bankruptcy Reform Act that something else was intended, we would not be justified in rewriting Section 522(f)(1) and Sections 101(27) and (28) so as to treat cognovit note judgment liens differently from all other judgment liens. Thus we reject the Bank's contention that Section 522(f)(1) is inapplicable.

III.

The holding in Part II requires the consideration of the Bank's constitutional challenge. It contends that prior to the enactment of the Bankruptcy Reform Act it had a valid property interest under Pennsylvania law in all the Debtor's real estate in Dauphin County, and that retroactive application of the exemption provision in Section 522(f)(1) would be a taking of that property interest, to the extent of $15,000, without due process of law. In advancing that contention the Bank relies chiefly on *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935), which held unconstitutional certain provisions of the Frazier-Lemke Act, Pub. L. No. 486 ch. 869, 48 Stat. 1289 (1934). The United States, which intervened in the action pursuant to 28 U.S.C. §2403, contends that Section 522(f)(1) applies to liens of cognovit notes filed prior to its enactment, and that such application does not violate the Fifth Amendment.

In approaching the consideration of the Bank's constitutional claim it is appropriate to narrow the inquiry by reference to issues which are not involved. The Bank makes no contention that congressional power to make "uniform Laws on the subject of Bankruptcies"[5] does not include the power to provide a uniform minimum standard for exemptions.[6] Nor does the Bank contend

5. U.S. Const. art. I, §8, cl. 4.

6. *Cf.* Hanover National Bank v. Moyses, 186 U.S. 181, 189-90 (1902) (recognition in Bankruptcy Act of 1898 of state exemption law is valid).

that a Bankruptcy law is unconstitutional which retroactively discharges debtors from the state law property interests, represented by their otherwise enforceable contractual undertakings.[7] It is no objection to Bankruptcy legislation that it may affect preexisting relationships under state law. Indeed the retroactive alteration of legal relationships is the essence of such legislation.

Moreover we are not dealing with the analytically distinct Fifth Amendment problem of taking private property for public use without just compensation. The taking clause of the Fifth Amendment imposes a distinct substantive standard — just compensation — when private property is diverted to public uses, even when the diversion takes place in the course of a bankruptcy proceeding. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *New Haven Inclusion Cases*, 399 U.S. 392 (1970); *In re Penn Central Transportation Company*, 494 F.2d 270, 278-79 (3d Cir. 1974). That substantive rule has been incorporated into the Fourteenth Amendment due process clause with respect to state takings for public purposes. *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U.S. 396 (1920). It has nothing to do, however, with legislation which, while it affects the existence or value of a property right, does not devote the property to public use. The line between governmental regulation and taking for public use may not always be distinct. *Compare Agins v. Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); and

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7. *Compare* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (state insolvency law applicable to contracts made prior to its enactment violates impairment of contracts clause) *with* Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902) ("The subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do.").

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) with *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Armstrong v. United States*, 364 U.S. 40 (1960); *United States v. Causby*, 328 U.S. 256 (1946); and *Nectow v. Cambridge*, 277 U.S. 183 (1928). But the consequences of classifying a law as an economic regulation rather than a taking for public use are clear. Only if a taking for public use is found does the just compensation standard apply. Plainly Section 522(f)(1) is an economic regulation rather than a taking for public use. If the exemption works a taking, it is a taking for the private use of the Debtors, not for the general use of the public or the particular use of a governmental agency.

The question, then, is a narrow one: to what extent does the due process clause of the Fifth Amendment place substantive limits upon the plenary grant of legislative authority in the bankruptcy clause of the Constitution. The government urges, and we agree, that federal bankruptcy legislation is classic economic regulation legislation, and should be measured, absent a taking for public use, for substantive due process purposes by the standard generally applicable to such legislation. Since *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), economic regulation has been sustained against substantive due process challenges if it rests upon a rational basis. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

Certainly the congressional decision reflected in Section 522(f)(1) to establish a federal minimum exemption, with state exemptions as an alternative, is a rational resolution of the competing interests of debtors seeking rehabilitation and creditors seeking payment. Homestead exemptions created by state law successfully met constitutional challenges prior to the enactment of the Bankruptcy Act of 1898. *Denny v. Bennett*, 128 U.S. 489 (1888). Congressional authority to leave a debtor

with what it considers to be the wherewithal necessary for a fresh start in economic life is at least as broad.

The Bank urges, however, that while Congress exercising its bankruptcy powers can exempt property from the reach of general unsecured creditors, it cannot affect the "property" rights of secured creditors under state law. There was a time, prior to *Carolene Products*, when that position might command respectful attention. But judges are no longer free to impose through the due process clause of the Fifth Amendment their own views as to substantive limitations upon plenary grants of congressional legislative authority. It is settled that federal bankruptcy law can eliminate vested property rights in contractual undertakings sanctioned by state law. There is no reason why that plenary power may not, if Congress should say so, operate on property rights, originating out of contractual undertakings, which state law recognizes as liens upon specific property.[8] If Congress goes too far in undermining the security for extensions of credit when exercising plenary legislative power under the bankruptcy clause, the result may be that credit will be unavailable. But that is a matter of policy judgment for the legislative branch. It has chosen in Section 522(f)(1) to strike the balance between security for obligations and rehabilitation for debtors by subjecting those state law property interests resulting from judicial liens to a federal homestead exemption, while leaving intact mortgages on specific property. It might have gone further. But the choice it made to subject only judgment liens to the exemption certainly satisfies rational basis review.

We recognize that *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), is significant authority suggesting that substantive due process limitations on the bankruptcy power are greater than we have recognized. For several reasons we conclude that it is not controlling. First, despite the eminence of its author, the

opinion hopelessly confuses the problem of taking property for public use without compensation with the distinct problem of substantive due process limitations upon plenary congressional legislative powers. *See* 295 U.S. at 601. The taking analysis simply cannot be reconciled with that made in the cases referred to above, distinguishing between regulation on the one hand and taking for public use on the other. If *Rudford* stands for the proposition that the just compensation standard applies to economic regulations which have the effect of changing the relative economic positions of property owners, it has been discredited by those cases. Second, as a substantive due process holding, the intense scrutiny the opinion applied to the Frazier-Lemke Act is entirely inconsistent with the standard for such scrutiny announced in *Carolene Products* and its progeny. Finally, even before *Carolene Products*, *Rudford* was effectively limited, if not tacitly overruled, by the decision in *Wright v. Vinton Branch of the Mountain Bank of Roanoke*, 300 U.S. 440 (1937), upholding a slightly revised version of the Frazier-Lemke Act. *See Helvering v. Griffiths*, 318 U.S. 371, 400-401 & n.52 (1943).

IV.

We hold, then, that Section 522(f)(1) applies to cognovit note judgment liens, and that as applied it is constitutional.

The judgment appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1629

In re: CHARLES E. ASHE and SUSAN J. ASHE
t/a C & S FUEL SERVICE,
Debtors

THE COMMONWEALTH NATIONAL BANK,
Objector

v.

UNITED STATES OF AMERICA,
Intervenor

The Commonwealth National Bank,
Creditor-Objector,
Appellant

(D.C. Bankruptcy No. 1-79-0082)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Bankruptcy Court — Wilkes-Barre)

Argued: November 19, 1981

Before: GIBBONS and HIGGINBOTHAM, *Circuit Judges*
and MEANOR, *District Judge**

(Opinion Filed: January 6, 1982)

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*Hon. H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

ORDER AMENDING OPINION

The slip opinion in the above matter is hereby amended as follows:

Page 5

In line 7, insert a comma after "filed"

Page 7

In line 1 of the first full paragraph, "definitions" is substituted for "definition"

In line 2 of that paragraph, insert a comma after "interest"

Page 10

In line 1, "with" should be italicized

Page 11

Footnote 8, although referenced in the printed text and included in the typescript, was omitted from the slip opinion. It should be inserted as followed:

"8. *But see* Rodrock v. Security Industrial Bank, 642 F.2d 1193 (10th Cir. 1981), *cert. granted sub nom.* U.S. v. Security Industrial Bank, 50 U.S.L.W. 3479 (U.S. Dec. 15, 1981), holding that application of Section 522(f) to liens created by state law prior to its enactment is unconstitutional. We decline to follow that holding."

JOHN J. GIBBONS
Circuit Judge

DATED: January 26, 1982

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts, The Legal Intelligencer, Phila., Pa.)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1629

In re: CHARLES E. ASHE AND SUSAN J. ASHE
t/a C & S FUEL SERVICE,
Debtors

THE COMMONWEALTH NATIONAL BANK, Objector

vs.

UNITED STATES OF AMERICA, Intervenor

The Commonwealth National Bank, Creditor-Objector,
Appellant

(Bankruptcy No. 1-79-00882)

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: GIBBONS and HIGGINBOTHAM, Circuit Judges
and MEANOR, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States Bankruptcy Court for the Middle District of Pennsylvania and was argued by counsel on November 19, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Bankruptcy Court, entered March 11, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

Clerk

January 6, 1982

*Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

In re Charles E. ASHE and Susan J. Ashe t/a C & S Fuel Service, Debtors.

The COMMONWEALTH NATIONAL BANK, Objector,

v.

UNITED STATES of America, Intervenor,

The Commonwealth National Bank, Creditor-Objector, Appellant.

The COMMONWEALTH NATIONAL BANK

v.

Robert G. DOBSLAW and Lynnore W. Dobslaw, individually and t/a Video Pl.

Appeal of The COMMONWEALTH NATIONAL BANK.

In re Aaron Franklin BURKHOLDER and Anna Mary Burkholder, husband and wife, Debtors.

Appeal of The COMMONWEALTH NATIONAL BANK.

In re Paul S. BOSWORTH and Mabel G. Bosworth.

Appeal of The COMMONWEALTH NATIONAL BANK.

Nos. 81-1629, 82-1434, 82-1435 and 82-1436.

United States Court of Appeals, Third Circuit.

No. 81-1629 Reargued on Remand; Nos. 82-1434 to 82-1436 Argued May 16, 1983.

Denied July 8, 1983.

Rehearing and Rehearing In Banc Denied Aug. 3, 1983.

Appeal was taken from order entered by the United States Bankruptcy Court for the Middle District of Pennsylvania, Thomas Wood, J., 20 B.R. 922, holding that lien of cognovit note was judgment

Pages misnumbered in original copy

lien subject to avoidance to extent permitted by Bankruptcy Code lien avoidance section and that applied section was constitutional. The Court of Appeals, Gibbons, Circuit Judge, 669 F.2d 105, affirmed. Petition for writ of certiorari was filed. The United States Supreme Court, 103 S. Ct. 563, granted writ, vacated judgment, and remanded case. After consolidating case with three others, the Court of Appeals, Gibbons, Circuit Judge, held that debtors were entitled to avoidance of liens claimed by bank.

Affirmed.

Becker, Circuit Judge, concurred in part and dissented in part and

filed opinion.

Petition for rehearing denied.

1. Bankruptcy -- 398(1)

Lien of a confession of judgment was a judicial lien to which debtors were entitled to avoidance. Bankr.Code, 11 U.S.C.A. §522(f)(1).

2. Bankruptcy -- 398(1)

Debtors were entitled to avoidance of claimed lien in bankruptcy case on ground that liens claimed by bank were created after enactment of statute governing avoidance, for whatever interests bank acquired were taken subject to provisions of statute. Bankr.Code, 11 U.S.C.A. §522(f)(1).

3. Bankruptcy -- 398(1)

Debtors were entitled to avoidance of claimed lien in bankruptcy case on ground that no lien in specific property was obtained prior to filing of bankruptcy petition. Bankr. Code, 11 U.S.C.A. §522(f)(1).

Ralph W. Boyles, Jr., Nauman, Smith, Shissler & Hall, Harrisburg, Pa., for appellant Com. Nat. Bank in No. 81-1629.

Stuart E. Schiffer, Acting Asst. Atty. Gen., Carlon M. O'Malley, Jr., U.S. Atty., David Epstein, John C. Morland, (argued), Attys. Civil

Div., Dept. of Justice, Washington, D.C., for intervenor/appellee, United States of America.

Howard Ulan, Jason W. Manne, Asst. Counsel, Dept. of Public Welfare, Office of Legal Counsel, Harrisburg, Pa., for amicus curiae, Com. of Pennsylvania, Dept. of Public Welfare.

John J. Brennan, Gordon W. Gerber, Candace S. Cummings, Dechert Price & Rhoads, Philadelphia, Pa., for amicus curiae, Pennsylvania Bankers Ass'n.

Jeannine Turgeon, Campbell, Spitzer, Davis & Turgeon, Harrisburg, Pa., for appellant The Com. Nat. Bank in Nos. 82-1434 to

82-1436.

James R. Leonard, Jr. (argued), Lancaster, Pa., for appellees, Robert G. Dobslaw, et al. in Nos. 82-1434 and 82-1436.

Kenneth R. Jewell, Central Pennsylvania Legal Services, Lancaster, Pa., for appellees, Aaron Franklin Burkholder and Anna Mary Burkholder.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before GIBBONS, HIGGINBOTHAM and BECKER, Circuit Judges.

OPINION OF THE COURT

GIBBONS, Circuit Judge:

We deal here with four appeals which were by order of this court, on January 11, 1983, consolidated.

One appeal is before us on remand from the Supreme Court, which on December 13, 1982 vacated our judgment in In Re Ashe, 669 F.2d 105 (3d Cir. 1982), and remanded for futher consideration in light of United States v. Security Industrial Bank, 459 U.S. ____, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982). The other three appeals are before us for the first time. All four involve the effect of section 522(f)(1) of the Bankruptcy Reform Act of 1978, 11 U.S.C. §522(f)(1)(Supp. III 1979), on liens claimed by the Commonwealth National Bank on property of a debtor by virtue of confessions of judgment notes. In each case the

bankrupt claimed and the Bankruptcy Court allowed the avoidance of the claimed lien pursuant to section 522(f)(1). In each case we affirm.

1.

The Bankruptcy Reform Act provides that "...an individual debtor may exempt from property of the estate ... property that is specified in subsection (d) ..." 11 U.S.C. §522(b)(1). Subsection (d) permits exemption of "[t]he debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor ... uses as residence ..." 11 U.S.C. §522(d)(1). The Act also provides that "[n]otwithstanding any

waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--(1) a judicial lien ..." 11 U.S.C. §522(f)(1). The Bank contends that if section 522(f)(1) were to be applied to the liens it asserts in these four cases it would be unconstitutional under Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed.1593 (1935). In our prior decision, 669 F.2d 105, we rejected that contention with respect to the

exemptions claimed by Charles E. and Susan J. Ashe for their residence in Dauphin County, Pennsylvania. The Supreme Court granted certiorari, and without opinion vacated our judgment and remanded "for further consideration in light of United States v. Security Industrial Bank."[1]

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[1] Simultaneously, the Supreme Court denied certiorari in Gardner v. Pennsylvania Department of Public Welfare, 685 F.2d 106 (3d Cir. 1982), cert. denied, ____ U.S. ____, 193 S.Ct. 580, 74 L.Ed.2d 939. In the Gardner case we held that liens resulting from confession of judgment notes are judicial liens within the meaning of the Bankruptcy Reform Act, not security interests or statutory lines. That holding binds this panel.

In the Security Industrial Bank case the Court considered the effect of section 522(f) on purchase money security interests perfected prior to the enactment of the 1978 Act. It held that because the application of section 522(f) to such perfected interests raised a non-frivolous constitutional issue under Radford the rule of statutory construction announced in Holt v. Henley, 232 U.S. 637, 34 S.Ct. 459, 58 L.Ed. 767 (1914), should govern; absent a clear expression of congressional intention, a statute purporting to divest property would be applied only prospectively. For reasons

which follow, we hold that in none of the four cases in which the Bank appeals can the Holt v. Henely rule apply, because that rule can have no application to judicial lien.

II.

In the Bankruptcy Act of 1898, Act of July 1, 1898, 30 Stat. 544, c. 541, section 67(f) provided for the automatic invalidation of all liens obtained by legal proceedings against a person who was insolvent within four months prior to the filing of a petition in bankruptcy. 30 Stat. at 565. Since the practice of taking confession of judgment notes was common in many states, it was inevitable that the question of

their effectiveness against section 67(f) would arise. In Wilson v. Nelson, 183 U.S. 191, 22 S.Ct. 74, 46 L.Ed. 147 (1901), the Court held that for purposes of that section the lien of a judgment note arose when an actual judgment was entered against the bankrupt, not when the warrant of attorney to confess judgment was executed. The Court observed:

> In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, "suffered or permitted" a judgment to be entered against him within four months before the filing of the petition in

> bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than other creditors; and the lien obtained by which, in a proceeding begun within four months, would be dissolved by the adjudication in bankruptcy, because "its existance and enforcement will work a preference."

183 U.S. at 198, 22 S.Ct. at 77.

Wilson v. Nelson presented a retroactivity question, for the warrant to confess judgment was executed in 1885, nearly thirteen years before the enactment of section 67(f). The Court nevertheless held that section 67(f)

applied, although four dissenting justices urged that as a matter of statutory interpretation there should be a "clear and unmistakable" declaration that the section was intended to change prior law. 183 U.S. at 211, 22 S.Ct. at 82 (Justice Shiras dissenting). See also In re Richards, 96 Fed. 935 (7th Cir. 1899); Grant v. National Bank of Auburn, 232 Fed. 201 (N.D.N.Y.1916); Grant v. National Bank of Auburn, 197 Fed. 581 (N.D.N.Y.1912).

The chief effect of section 67(f) was to preserve for the debtor's estate, and thus for general unsecured creditors, property subjected to judicial

liens. In Chicago, Burlington & Quincy R.R. v. Hall, 229 U.S. 511, 33 S.Ct. 885, 57 L.Ed. 1306 (1913), however, the Court considered the interrelationship between section 67(f) and state exemption laws. Under section 6 of the 1898 Act, the Bankruptcy Court was directed to apply the exemption laws of the state of the bankrupt's domicile. Act of July 1, 1898, ch. 541, §6, 30 Stat. 548. A Nebraska domiciliary was sued in an Iowa court, and suffered a garnishment judgment against his wages. When the Iowa court refused to recognize the Nebraska exemption the Nebraska domiciliary, within four months,

filed a petition in bankruptcy. The Bankruptcy Court recognized his exemption, and the bankrupt, in Nebraska, sued to recover the garnished wages. The Supreme Court of Nebraska entered judgment in favor of the bankrupt, and the garnishee appealed, contending that it was protected by the Iowa judgment. The Supreme Court held that under section 67(f) the Iowa judgment was void, and that the bankrupt could take advantage of the section in enforcing the Nebraska exemption recognized by section 6 of the Bankruptcy Act. The Court observed:

Barring exceptional cases, which are specially provided for, the policy of the act is to fix a four months period in which a creditor cannot obtain an advantage over other creditors nor a lien against the debtor's property. "All liens obtained by legal proceedings" within that period are declared to be null and void. That universal language is not restricted by the later provision that "the property affected by the ... lien shall be released from the same and pass to the Trustee as a part of the estate of the bankrupt." It is true that title to exempt property does not vest in the trustee and cannot be administered by him for the benefit of the creditors. But it can "pass to the Trustee as a part of the estate of the bankrupt" for the purposes named elsewhere in the statute, included in which is the duty to segregate, identify and appraise what is

claimed to be exempt. He must make a report "of the articles set off to the bankrupt, with the estimated value of each article" and creditors have 20 days in which to except to the Trustee's report. Section 47(11) and General Orders in Bankruptcy, 17. In other words, the property is not automatically exempted but must "pass to the Trustee as apart of the estate" -- not to be administered for the benefit of creditors, but to enable him to perform the duties incident to setting apart to the bankrupt what, after a hearing, may be found to be exempt. Custody and possession may be necessary to carry out these duties and all levies, seizures, and liens, obtained by legal proceedings within four months, that may or do interfere with that

> possession are annulled, not only for the purpose of preventing the property passing to the trustee as a party of the estate, but for all purposes, including that of preventing their subsequent use against property that may ultimately be set aside to the bankrupt. This property is withdrawn from the possession of the Trustee not for the purpose of being subjected to such liens, but on the supposition that it needed no protection inasmuch as they had been nullified.

229 U.S. at 515-16, 33 S.Ct. at 886-87.

In section 6 of the 1898 Act Congress adopted as federal the exemption laws of the bankrupt's domicile, thereby making those laws enforceable nationwide. The Hall

case construed section 67(f) as protection such exemptions. Thus as early as 1913 it was settled that Congress had authority under the bankruptcy clause of the Constitution to set aside judicial liens for the purpose of enforcing the provisions of the exemption laws it chose to recognize. That was the state of the law with respect to exempt property and judicial liens when, almost a year later, the Court in Holt v. Henley announced the rule of construction on which the Bank relies. Plainly Holt v. Henley does not speak at all to the appropriate treatment of judicial liens. Their status, as subject to plenary power

of Congress, had already been settled. Moreover the legislative history of the present exemption provision makes clear that Congress was well aware of the rule of the Hall case. In the Senate Report on Pub.L. 95-989 it notes that "[t]he debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien ..." and that "[s]ubsection (f) gives the debtor the ability to exempt property that the trustee recovers under one of the trustee's avoiding powers ..." S.Rep. No. 989, 95th Cong., 2d Sess. 76, reprinted in 1978 U.S.Code Cong. and Ad.News,

5787, 5862. The quoted language must be understood as restating the Hall rule, for it was well known among bankruptcy experts. Indeed in 1936, when the 1898 Act was substantially revised, the analysis of H.R. 12889, 74th Cong., 2d Sess (1936), 209, referring to the successor of section 67(f), noted expressly that it was intended to preserve the rule established in the Hall case. See 1A Collier on Bankruptcy, ¶6.12 at 865 n. 6 (14th ed. 1978). With respect to avoidance of judicial liens Congress was in 1978 doing nothing more than it had done eighty years earlier.

For purposes of the due process

clause of the fifth amendment, which is the textual predicate for the Bank's constitutional argument, the statutory treatment of exemptions from judicial liens in the 1898 and 1978 Acts is indistinguishable. Section 6 of the 1898 Act adopted as a federal standard the exemption law of the Debtor's domicile. Prior bankruptcy acts had adopted uniform federal standards. See Acts of April 4, 1800, §34, 2 Stat. 19, 30 (1801); Act of March 2, 1867, ch. 176, §14, 14 Stat. 517, 522 (1868). In 1978 Congress provided a federal standard for exemptions but provided for an election by the debtor between the federal exemption and

any more favorable state standard. 11 U.S.C. §522(b). In each case, however, it was the federal bankruptcy law which made the exemption effective. Under the 1898 Act, as interpreted in Hall, section 67(f) permitted the avoidance of judicial liens in the interest of protecting exemptions recognized by that law. What Congress did in section 522(f)(1) adds nothing of constitutional dimensions, with respect to the avoidance of judicial liens, to what it did in 1898. There is no reason, therefore, to assume that Congress intended that those liens would be affected only prospectively. In order to reach

that conclusion one would have to assume a congressional intention to protect some judicial liens which from 1898 to 1978 were unprotected.

III.

[1] The Bank contends that we erred when in our initial decision in Part II of the Ashe opinion we treated their judgment note lien as a judicial lien rather than a security interest or a mortgage. 669 F.2d at 108-09. We reject that contention for two reasons. First, we are convinced that the analysis of that question in our Ashe opinion is sound. The Supreme Court's remand of that case cannot be

understood to have cast it in doubt, because the Holt v. Henley rule would have no application if, as the Bank argues, section 522(f)(1) were inapplicable. Second, even if we had second thoughts about whether the lien of a confession of judgment was not a judicial lien, this panel could not act upon them. The opinion in Gardner v. Pennsylvania Department of Public Welfare, 685 F.2d 106 (3d Cir.1982), cert. denied, ____ U.S. ____, 103 S.Ct.580, 74 L.Ed.2d 939 (1982), is a square holding that a confession of judgment liens are judicial liens. While the judgment in this case is not final, that in Gardner

is. Only a majority of a court in banc may overrule it as a precedent in this circuit.

IV.

[2] What we have said thus far suffices to dispose of the Ashe case. There are, however, independent reasons for affirmance in the other appeals. In the Burkholder case the note containing the confession of judgment clause was executed on January 19, 1979. In the Dobslaw case two notes are involved. One was made on October 29, 1979, and the other on May 29, 1980. The Bankruptcy Reform Act of 1978 was enacted on November 6,

1978. Thus the judgment notes in the Burkholder anbd Dobslaw cases were taken with notice of the provisions of section 522(f)(1) of the Act. The Bank is in no position, in those cases, to urge the application of Holt v. Henley rule, for whatever interest it acquired was taken subject to the provisions of an already enacted federal statute.

As the dissent points out, even in the Ashe case no specific lien arose until after the enactment of the Bankruptcy Reform Act. The dissent urges that the Holt v. Henley rule applies to liens arising in the so called "gap period"

between the passage and the effective date of that Act. Two courts of appeals have already held, however, that creditors acquiring liens in the gap period are not protected by the fifth amendment because they acquried those liens with notice of the future effect of the Act. In re Lawrence Archuleta, United States v. C.I.T. Financial Services, Inc., 707 F.2d 451 (10th Cir.1983); Webber v. Credithrift of America, Inc., 674 F.2d 796 (9th Cir.1982), cert. denied, ____ U.S. ____, 103 S.Ct. 567, 74 L.Ed.2d 931 (1982). Those holdings, which are in our view correct, provide an alternative ground for affirming in

Ashe. Thus even if we were convinced that the Holt v. Henley rule had any application to judicial liens, and we are not, we would reach the same result.

B.

[3] In the Bosworth case the note containing a confession of judgment clause was executed on April 17, 1978 before the enactment of the Bankruptcy Reform Act. As permitted by Pennsylvania law, it was filed with a County Prothonotary. But whereas in the Ashe case the Bank proceeded, upon default, to obtain a judgment in assumpsit and a writ of execution,

the Bank had not, prior to July 13, 1981, when the Bosworths filed their voluntary bankruptcy petition, done anything more than file the note ith the Prothonotary. The Security Industrial case and Holt v. Henley deal with liens on specific property. In the Bosworth case the lien never became specific prior to the bankruptcy. it was not even as perfected a lien as that in Ashe.

Nonspecific judicial liens have not been regarded as property interests subject to a taking analysis. In the early case of Conard v. Atlantic Insurance Company, 26 U.S. (1 Pet.) 386, 442, 7 L.Ed. 189 (1828), for example, in

reviewing the effect of nonspecific judgment liens in Pennsylvania, the Court concluded that a judgment lien did not create a property right in land, but only the opportunity to make a levy. The law in Pennsylvania is to the same effect. Grevemeyer v. Southern Mut. Ins. Co., 62 Pa. 340 (1869) (distinguishing between specific lien of a mortgage and general lien of a judgment). See to the same effect Freeman, Judgments, §338 & n. 1 (4th ed. 1982). The interests held to be protected from an unconstitutional taking in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854,

79 L.Ed. 1593 (1935), were not general liens, but mortgages on specific property. They created vested rights in specific property. No case has been called to our attention applying a taking analysis to nonspecific liens. Long before the Radford case was decided, however, the Court held that under the provisions of section 70 of the 1898 Act a trustee could enforce for the benefit of general creditors a judicial lien obtained by a specific creditor within four months of bankruptcy. Globe Bank v. Martin, 236 U.S. 288, 35 S.Ct. 377, 59 L.Ed. 583 (1914). If a judgment lien could be "taken" for that purpose,

obviously it was not protected by the taking clause of the fifth amendment. Thus we conclude that the Bank's nonspecific lien arising from a cognovit note would not fall within the ambit of Radford even if that case has any continuing vitality. Certainly the nonspecific lien, not refined to a levy on specific property, is not subject to greater constitutional protection than was the garnishment of a specific debt in Chicago Burlington & Quincy R.R. v. Hall, supra.

V.

The judgments in Dobslaw, No. 82-1434, and Burkholder, No.

82-1435, will be affirmed on the ground that the liens claimed by the bank were created after enactment of section 522(f)(1), and are subject to its terms. The judgment in Bosworth, No. 82-1436, will be affirmed on the ground that no lien in specific property was obtained prior to the filing of the bankruptcy petition. The judgment in Ashe will be affirmed on the ground that it is a judgment lien which under Chicago Burlington & Quincy R.R. v. Hall was prior to 1978 subject to divestiture in the Bankruptcy Court in order to effectuate an exemption provided by law, and the enactment of section

522(f) made no change in the law of constitutional significance.

BECKER, Circuit Judge, concurring in part and dissenting in part.

The four cases before us each raise a different question. Those questions presented in Dobslaw and Burkholder are relatively easy to

answer; for the reasons stated in the margin, I join in the majority's disposition of those two cases.[1]

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[1] The parties in Dobslaw executed the notes at issue after the effective date of the Bankruptcy Reform Act of 1978; there thus can be no "retroactivity" problem here, and the only question is whether the cognovit notes constitute avoidable "judicial lines" within the meaning of 11 U.S.C. §522(f)(1). We have, however, previously resolved this issue. Gardner v. Commonwealth of Pa., Dep't of Pub. Welfare, 685 F.2d 106, 108 (3d Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 580, 74 L.ed.2d 939 (1932), held that "a lien obtained by confessed judgment is a judicial lien avoidable under section 522(f)(1) of the Code, and not a security interest or a statutory lien." We are bound by Gardner and therefore must affirm the judgment in Dobslaw.

Because Burkholder raises some of the problems also found in Bosworth, see infra Part IIA, it could be viewed as a much harder case. There is, however, a simple alternative ground for affirming the bankruptcy court's holding. They note in Burkholder was executed on January 19, 1979, after the enactment date, but before the effective date, of the 1978

Although I disagree with the majority's conclusion in Ashe, I do not find Ashe to be a particularly

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[1] Bankruptcy Act. (The 1978 Bankruptcy Act was signed into law by the President on November 6, 1978, (the "enactment date") but did not become effective until October 1, 1979 (the "effective" date").) The case thus presents a "gap" lien, created at a time when the parties to the transaction may be deemed to have had notice of the already enacted but not yet effective statute. The Supreme Court has expressly reserved decision on the validity of applying §522(f)(2) to "gap" lines. United States v. Security Indus. Bank, 103 S.Ct. 407, 410 n. 4, 414 n. 11 (1982).

In addressing the constitutionality of applying §522(f) to "gap" liens, the Court of Appeals for the Ninth Circuit wrote:

> Although a close question is presented, we agree with the bankruptcy court in the instant case that it is "not unreasonable to impute to credit companies and their attorneys the knowledge and understanding of a new law

most important -- case before us is Bosworth. While I concur in the result reached by the majority in that case, I believe that the question presented is far more difficult than the majority's opinion suggests; indeed, I think that the question is an extremely close one, and I will explain in Part IIA, infra, why I think it is so close.

The Court of Appeals for the Tenth Circuit recently adopted Webber's analysis in In re Groves, 707 F.2d 451 (10th Cir. 1983); accord In re Hoffman, 28 B.R. 503, 505, 507 (Bakrtcy.D.Md.1983). I assume that the majority approves of the reasoning in the Ninth Circuit's opinion, and I, too, concur. I therefore agree that the judgment in Burkholder must be affirmed.

difficult case, and I explain in Part IIB, infra, my reasons for dissenting from the majority's judgment. The most difficult -- and

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after that law has been enacted." When [the bank] made the loans [in the "gap" period], it should have been fully aware that the exemption provisions of §522 would become effective on October 1, 1979, and that any bankruptcy filed subsequent to that date could result in an avoidance of their liens on the exempt property. The bankruptcy court properly distinguished between cases where the liens arose before the enactment date and those arising after the enactment date where the creditor had knowledge of the prospective exemption provisions.

In re Webber, 674 F.2d 796, 804 (9th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 567, 74 L.Ed.2d 931 (1982).

Ashe is now before us on remand from the Supreme Court for reconsideration in light of United States v. Security Industrial Bank, ____ U.S. ____, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982); the other cases were consolidated with Ashe following the remand. An exegesis of my position therefore must commence with a discussion of Security's holding -- a useful undertaking, in view of the limited attention it has received in the majority's opinion.

I. United States v. Security Industrial Bank

Security Industrial Bank presented the qusetion whether

debtors could invoke section 522(f)(2) of the 1978 Bankruptcy Act to avoid nonpossessory, nonpurchase-money security interests

created prior to the enactment of the statute.[2]

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[2]Section 522(f) provides:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--
>
> (1) a judicial lien; or
>
> (2) a nonpossessory, nonpurchase-money security interest in any-
>
> (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
>
> (B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
>
> (C) professionally prescribed health aids for the debtor or a dependent of the debtor.

11 U.S.C. §522(f)(Supp. 111 1979).

Appellees, a group of creditors, there argued that allowing debtors to use section 522(f)(2) to avoid such pre-enactment liens on the debtors' personal property would violate the fifth amendment to the United States Constitution. The Court of Appeals for the Tenth Circuit held that Congress had intended section 522(f)(2) to invalidate liens created before the enactment date of the 1978 Act and ruled that such retrospective application effected a complete and uncompensated taking of private property, in violation of constitutional precepts. Rodrock v. Security Industrial Bank, 642 F.2d

1193 (10th Cir.1981).

The Supreme Court affirmed the judgment of the Tenth Circuit but relied on a different rationale. The Court agreed that "[t]he bankruptcy power is subject to the Fifth Amendment's prohibition against asking private property without compensation," 103 S.Ct. at 410, and also declared itself satisfied that "there is substantial doubt whether the retroactive destruction of the appellee' liens

in these cases comports with the Fifth Amendment." id. 103 S.Ct. at 412.[3]

[3]The Court made clear that nonpossessory, nonpurchase-money security interests constitute property rights -- a necessary predicate to a fifth-amendment claim, for that amendment provides that "private property [shall not] be taken for public use, without just compensation," U.S. Const. amend. V(emphasis added). See 103 S.Ct. at 411 (distinguishing contractual from property rights). Indeed, the Government conceded at oral argument that state law treated the liens at issue as property. Id. n. 6.

But, instead of deciding the constitutional question, the Court proceeded to

> consider whether, as a matter of statutory construction, §522(f)(2) must necessarily be applied in that manner. We consider the statutory question because of the "'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be applied.'"

Id. (quoting Lorillard v. Pons, 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978)).

To perform its task, the Court invoked a basic canon of statutory construction: a statute that would interfere with "antecedent rights" will not be construed to apply

retrospectively "'unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."'" Id. 103 S.Ct. at 413 (quoting Union Pacific Railroad Co. v. Laramie Stock yards Co., 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913)). Noting that "[t]his principle has been repeatedly applied to bankruptcy statutes affecting property rights," id., the Court examined the legislative history of the 1978 Bankruptcy Act and found no evidence that

Congress had intended section

522(f)(2) to apply retrospectively.[4]

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[4]Indeed, the Court found some evidence that Congress had not intended §522(f)(2) to have retrospective effect:

> An early version of the 1978 Act contained an explicit requirement that all its provisions "shall apply in all cases or proceedings instituted after its effective date, regardless of the occurrence of any of the operative facts determining legal rights, duties or liabilities hereunder." H.R. 31, 94th Cong., 1st Sess, §10-103(a)(1975), reprinted in Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Right [sic] of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975), n. 14 app., at 320-321. This provision may or may not have been deleted directly in response to the comments of witness William Plumb to the effect that retroactive invalidation of liens may be unconstitututional taking. Id., at 2066-2067. Nonetheless, Congress's elimination of an explicit command is some evidence that it did not intend to depart

Id. 103 S.Ct. at 414. Accordingly, in the absence of countervailing legislative intent, the Court "'decline[d] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive question arising out of the guarantees of the' takings clause." Id. (quoting NLRB v. Catholic Bishops of Chicago, 440 U.S. 490, 507, 99 S.Ct. 1313, 1322, 59 L.Ed.2d 533 (1979)).

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from the usual principle of construction See Bradley v. Richmond School Boards, 416 U.S. 696, 716, n. 23, 94 S.Ct. 2006, 2018 n. 23, 40 L.Ed.2d 476 ... (1974) ("We are reluctant to read into the statute the very ... limitation that Congress eliminated.").

103 S.Ct. at 414.

Security Industrial Bank, therefore, enunciated four principles of direct relevance to the cases now before us: (1) There is "substantial doubt" that the application of section 522(f)(2) to liens created berore the enactment of the statute comports with the fifth amendment; (2) we nevertheless should refrain from deciding the constitutionality vel non of the alleged taking if we can avoid that question by means of statutory construction; (3) in performing this exercise, we must recognize that, "in the absence of an explicit command from Congress," "[n]o bankruptcy law shall be

construed to eliminate property rights which existed before the law was enacted." 103 S.Ct. at 414; and (4) the legislative history of the 1978 Act contains no "clear expression" of a congressional desire for retrospective application and, indeed, "suggests that Congress may not have intended that §522(f) operate to destroy pre-enactment property rights," id. It is against this backdrop -- to which I believe that the majority pays too little attention -- that we must consider the Bosworth and Ashe cases.

I first will consider whether nonpurchase-money security interest, constitutes a property right, for, in the absence of such a property interest, the fifth amendment's prohibition against taking private property for public use without just compensation does not apply, see supra note 3. In considering this question, I note that "while the meaning of 'property' as used in the Fifth Amendment [is] a federal question, 'it will normally obtain its content by reference to local law.'" United States v. Causby, 328

U.S. 256, 266, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206 (1946)(quoting United States ex re. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 279, 63 S.Ct. 1047, 1054, 87 L.Ed. 1390 (1943)). Accordingly, it is to Pennsylvania law that I must look in determining whether a judicial lien created by a cognovit note constitutes "property".[5]

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[5]It is clear that Pennsylvania law applies here: the notes were made in Pennsylvania between Pennsylvania parties and operate as liens on Pennsylvania real estate.

The question whether any "property" was taken in Bosworth is an extremely close one, but, because I conclude that no "property" was involved, I need not consider in any greater depth the principles of Security. I do conclude, however, that the Bank did have a property interest in the real estate at issue in Ashe. I therefore will have to consider the question whether there is any reason to treat a property right under section 522(f)(1) differently from a property right under section 522(f)(2).

Cognovit notes (or confessions of judgment) are an ancient security device[6] and have long been

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[6]According to Blackstone,
it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by nihil dicit, cognovit actionem, or non sum informatus) in an action of debt to be brought by the creditor against the debtor for the specific sum due: which judgment, when confessed, is absolutely complete and binding; provided the same (as is also required in all other judgments) be regularly docquetted: ...

3 W. Blackstone, Commentaries *397 (footnote omitted).

recognized by Pennsylvania law. See Swarb v. Lennox, 405 U.S. 191, 193 92 S.Ct. 767, 768, 31 L.Ed.2d 138 (1972). It is hornbook law that

> [a] confession of judgment constitutes a voluntary submission to the jurisdiction of the court, and it gives by consent, and without the services of process, a result which could otherwise be obtained only by process through a formal proceedings it constitutes but one of the ways by which a person may be sued.
>
> * * *
>
> The record of a the entry of a judgment by a prothonotary, under a power contained in the instrument on which judgment is confessed is ... regarded as a record of the court, having all the qualities of a judgment entered by a prothonotary under a warrant of attorney, in legal effect, is the same

> as if the judgment had been entered by the court, and it has all the qualities and effect of a judgment on a verdict.

11 Standard Pennsylvania Practice 2d § 67:4 (1983)(footnotes omitted).

Under Pennsylvania law, a judgment for payment of money, when entered of record in the office of a county prothonotary, operates as a lien upon all real property of the

debtor in that county. 42 Pa.Cons.Stat. Ann. §4303(a)(Purdon 1983);[7]

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[7]Section 4303(a) provides:

Any judgment or other order of a court of common please for the payment of money shall be a lien upon real property on the conditions, to the extent and with the priority provided by statute or prescribed by General Rule adopted pursuant to section 1722(b)(relating to enforcement and effect of orders and process) when it is entered of record in the office of the clerk of the court of common pleas of the county where the real property is situated, or in the office of the clerk of the branch of the court of common please embracing such county.

see also id. §§1722(b) and 2737(3); Pa.R.Civ.P. 2951. Because the holder of cognovit note thus becomes a lienholder once he has entered the judgment of record in the prothonotary's office, appellant Commonwealth National Bank, aided by amicus curiae Pennsylvania Bankers Association, asserts that it acquired a property interest in all real property owned by appellees at

the time the Bank recorded the cognovit notes here at issue[8]

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[8]A judgment lien attaches only to property or interests that the judgment debtor owned at the time of entry of judgment; it is not a lien on after-acquired lands or interests in lands. However, real estate acquired by the debtor after the date of entry of judgment is subject to a lien based on the levy of an execution issued on the judgment and levied on the land. 11 Standard Pennsylvania Practice 2d, supra, §70:12.

and that Security Industrial Bank bars the retroactive application of section 522(f)(1) to that property interest.[9]

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[9] The Bosworths signed the note on April 17, 1978, and the Bank entered the note with the prothonotary on April 27, 1978, before the enactment of the 1978 Bankruptcy Act.

Appellees and intervenor/appellee United States, however, contend that a judgment lien is not a property interest because it is insufficiently "choate" and does not give the judgment creditor a right in specific property. Instead, they assert, the lien is merely a charge against property, which serves as nothing more than collateral for the money that the creditor actually wishes to recover. Appelleees note that the lien does not endow the lienholder with title to the land; rather, the judgment creditor first must file an action in assumpsit and

obtain a writ of execution before he can levy, execute, or garnish on the basis of judgment.[10]

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[10]Moreover, confessed judgments may be opened, Pa.R.CIV.P. 2959, and defenses interposed, 41 Pa.Stat.Ann §407(a)(Purdon 1983), infra note 11. This Court has described the process by which a cognogvit judgment may be opened and has noted the facility with which a judgment debtor may do so.

> After the confession, a defendant may petition to open or strike the judgment... Testimony, depositions, admissions or other evidence may be produced and "if evidence is produced which in a jury trial would require the issues to be submitted to the jury, the court shall open the judgment." This latter provision has the effect of requiring an adjudication of the defenses supported by evidence. If they should be decided by a jury, the court must open the judgment.

Thus, the state proceedings are much more than simply a judgment entered by confession. When there is a proceeding to open the judgment, ... the litigation

§407(a)(Purdon 1983).[11]

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becomes an adversary proceeding which there is an adjudication upon the merits of defenses raised. Riverside Memorial Mausoleum, Inc. v. UMET Trust, 581 F.2d 62,67 (3d Cir.1978)(footnote omitted)(quoting Pa.R.Civ.P. 2959(e))

[11]Section 407(a) provides:

> As to any residential real property, a plaintiff shall not have the right to levy, execute or garnish on the basis of any judgment or decree on confession, whether by amicable action or otherwise, or on a note, bond or other instrument in writing confessing judgment until plaintiff, utilizing such procedures as may be provided in the Pennsylvania Rules of Civil Procedure, files an appropriate action and proceeds to judgment or decree against defendant as in any original action. The judgment by confession shall be changed as may be appropriate by judgment, order or decree entered by the court in the action.

Thus, appellees contend, a judicial lien constitutes not a property interest but a right to levy on land and thereby to obtain such an interest.

After the above mentioned original action has been prosecuted and a judgment obtained, that judgment shall merge with the confessed judgment and the confessed judgment shall be conformed as to amount and execution shall be had on the confessed judgment. The parties to the action shall have the same rights as parties to other original proceedings. Nothing in this act shall prohibit a residential mortgage lender from proceeding by action in mortgage foreclosure in lieu of judgment by confession if the residential mortgage lender so desires.

To support their position, appellees rely primarily on two venerable cases, Conard v. Atlantic Insurance Co., 26 U.S. (1 Pet.) 386, 442-43, 7 L.Ed. 189 (1828), and Grevemeyer v. Southern Mutual Fire Insurance Co., 62 Pa. 340, 342 (1869). In Conard, the Supreme Court explicated a prior case involving Pennsylvania law:

> [I]t is not understood, that a general lien by judgment on land constitutes, per se, a property or right in land itself. It only

confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. His title to it is not divested or transferred by the judgment, to the judgment-creditor, and even against him, unless he consummates his title by a levy on the land, under his judgment. In that event, the prior levy is, as to him, void; and the creditor loses all right under it. The case stands, in this respect, precisely upon the same ground as any other defective levy or sale. The title to the

land does not pass under it. In short, a judgment-creditor has no jus in re, but a mere power to make its general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of sale into the hands of vendor or vendee, or to claim the purchase-money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold, and he can trace the proceeds, and, waiving the tort, chooses to claim the latter. The only remedy of the judgment-creditor is against the thing itself, by making that a

> specific title, which was before a general lien. He can only claim the proceeds of the sale of the land, when it has been sold on his own execution, and ought to be applied to its satisfaction.

26 U.S. (1 Pet.) at 442-43 (discussing Thelusson v. Smith, 15 U.S. (2 Wheat.) 396, 4 L.Ed. 271 (1817). The Pennsylvania Supreme Court adopted a similar approach in Grevemeyer:

> A judgment is a general, and not a specific lien ... If there be personal property of the debtor, it is to be satisfied out of that. If there be not, then it is a lien on all his real estate without discrimination, and hence the plaintiff is not interested in the property as property, but

> only in his lien. As was said in Coover v. Black, 1 Barr 493, the judgment-creditor has neither jus in re nor ad rem, as regards the defendant's property. He has a lien, and the law gives a right to satisfaction out of the property, and that is all.

62 Pa. at 342 (citation omitted); see also Matter of Hinson, 20 B.R. 753, 758 (Bkrtcy. D.S.C.1982); In re Lattimore, 12 B.R. 111, 114 (Bkrtcy.W.D.N.Y.1981); In re Burkholder, 11 B.R. 346, 351 (Bkrtcy.E.D.Pa.1981); cf. 11 Standard Pennsylvania Practice 2d, supra, §70:4 ("The lien of judgment on lands does not constitute a property, estate, or right in the land itself... The creditor is not interested in the property as

property, but only in his lien.")(footnotes omitted).

I find the argument that a judicial lien is not a property interest very troubling because of the obvious practical effects of a cognovit-judgment lien on all realty within a county. As anyone who has practiced law in Pennsylvania knows, a judgment debtor who wishes to sell his encumbered land will not be able to obtain a declaration of clear title from a title-insurance company, even if the judgment lien has been opened; the title company either will hold back from the proceeds of the sale an amount sufficient to satisfy the

outstanding lien or will insist upon receiving indemnification with good security. Moreover, a cognovit-judgment lien is taxable to the judgment creditor under the County Personal Property Tax, 72 Pa.Stat. Ann. §4821 (Purdon 1968).[12]

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[12] I realize, however, that states can also tax contract rights.

And most important, a judgment lien would seem to be more specific and choate than the nonpossessory, nonpurchase-money security interests deemed to be property in Security Industrial Bank.[13]

[13]As noted above, see supra note 3, the Government conceded at oral argument in Security that the liens at issue were treated as property under state law. 103 S.Ct. at 411 n. 6.

That case involved security interests in an array of household items, which, as a category, are undoubtedly far more alienable, fungible, and, I would assert, nonspecific than are the components of the category "all of the judgment debtor's property within the county." I also note that post-Security bankruptcy-court cases have considered judicial liens to be property and have barred the avoidance of pre-enactment liens, In re Hoffman, supra, note 1, 28 B.R. at 506-07; In re Negri, 27 B.R. 941, 942-43 (Bkrtcy.E.D.N.Y.1983); In re White, 25 B.R. 339, 340 (Bkrtcy. 1st Cir.1982); cf. Note,

Constitutionality of Retroactive Lien Avoidance, Under Bankruptcy Code Section 522(f), 94 Harv.L.Rev. 1616 (1981)(pre-Security conclusion that retroactive application violates "takings clause" of fifth amendment).

Despite these countervailing considerations, however, I cannot ignore the language of Conard and Grevemeyer; nor can I forget the nature, incidents, and effects of cognovit-note liens, including the state policy that facilitates the interposition of defenses to the judgment, see supra note 10. I therefore reluctantly conclude that a judicial lien is not "property"

under Pennsylvania law and that the dictates of the fifth amendment thus do not apply. Accordingly, I agree with the majority that the judgment in Bosworth be affirmed.[14]

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[14]My conclusion here provides the alternative holding for Burkholder, see supra note 1, for, if the Bank did not have a property interest in the Bosworths' real estate, neither did it have one in the Burkholders'. The "gap" analysis therefore is not the only reason to affirm the judgment in that case.

B. Ashe

Ashe presents an entirely different situation. Mr. and Mrs. Ashe executed the cognovit note at issue on December 26, 1973, well before the 1978 Bankruptcy Act was enacted.[15]

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[15] It is true that the Bank "revived" the note on November 22, 1978, pursuant to Pennsylvania law's prescription that a judgment lien remains effective for only five years unless revived. See 42 Pa.Cons.Stat.Ann. §5526 (Purdon 1981); 11 Standard Pennsylvania Practice 2d, supra, §70:158. Although the revival occurred during the "gap" period and the revival action thus might be viewed as having been brought with notice of the 1978 Bankruptcy Act, see In re Webber, supra note 1, I do not read Pennsylvania law as endowing the revived judgment with the characteristics of a new judgment; rather, the revival merely

The loan became delinquent, and, on May 30, 1979, in the "gap" period between the enactment and effective dates of the 1978 Act, see supra note 1, the Bank filed a complaint

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continues or extends the vitality of the original judgment. See Philadelphia Nat'l Bank v. Taylor, 421 Pa. 35, 37-38, 218 A.2d 246, 247-48 (1966)(revival of judgment does not alter priority among judgment creditors); Pa.R.Civ.P. 3025 (setting forth rules "to revive and continue the lien of a judgment"); 11 Standard Pennsylvania Practice 2d, supra, §70:159 ("principal effect of the usual revival, or judgment of revival, is to continue the lien of the orignal judgment"). Thus, I do not believe that the 1978 revival means that we are dealing with a "gap" lien.

in assumpsit pursuant to 41 Pa.Stat.Ann. §407(a), supra note 11, so that it could levy on the Ashes' property. The Bank obtained a default judgment, and a writ of execution was issued on August 31, 1979, still within the "gap" period.

It is the action in assumpsit and the ensuing writ of execution that differentiate this case from Bosworth, for, while a bare judicial lien apparently is too general and inchoate to constitute a property

interest, the writ of execution perfects the lien, quantifies its amount, attaches it to specific real property, and elevates the judgment creditor's interest to something virtually akin to title. If the lien constituted merely "a right to levy," Conard v. Atlantic Insurance Co., supra, 26 U.S. (1 Pet.) at 443, the writ of execution converts that right into a full-fledged property interest. Accordingly, the Bank acquired a property interest in the

Ashes' real estate before the 1978 Bankruptcy Act became effective on October 1, 1979.[16]

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[16] I do not believe that the "gap" analysis explored above, see supra note 1, applies to these facts. That analysis is predicated on the theory that "it is 'not unreasonable to impure to credit companies and their attorneys the knowledge and understanding of a new law after that law has been enacted.'" In re Webber, supra, 674 F.2d at 804, the rationale being that creditors may be expected to act in accordance with the law that they know will eventually be in effect. It would be unreasonable, however, to apply this analysis to a gap-period assumpsit action on a pre-enactment lien, for unlike the creditors in Webber, Groves, and Burkholder, the Bank in Ashe would be deprived of all notice and of opportunity to structure its affairs in accordance with the new statute were that law to apply as of its enactment date. Indeed, the majority tacitly concedes the inapplicability of "gap" analysis by treating the lien in Ashe as a property interest and by contrasting the lien in Bosworth with the lien in Ashe, see majority op. at IVB.

Because we are dealing with a legitimate property interest in Ashe, Security Industrial Bank must govern the disposition of that case -- unless there is something in the nature of that property interest that would render Security

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To the extent that the majority reads in my opinion as stating that "the Holt v. Henley rule applies to liens arising in the so called 'gap period' between the passage and the effective date of that Act," majority op. at IV, the majority mischaracterizes my position. As I stated above, see supra note 1, I agree with Webber and Groves

inapplicable. The majority purports to have found some such thing in the form of the 1898 Bankruptcy Act which was in effect at the time the property interest's creation. The majority's theory is that the 1978 Bankruptcy Act wrought no change "of constitutional significance" in its predecessor's treatment of judicial liens and that the parties therefore created the pre-enactment liens with full notice of avoidance provisions

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insofar as those cases hold that liens created after the enactment date are avoidable under §522(f)(1). I reject the majority's "gap" analysis only in the Ashe case, in which the assumpsit action, rather than the creation of the lien by execution and entry of the cognovit note, occurred with the "gap" period.

substantially identical to section 522(f)(1). Accordingly, the argument continues, no taking

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I also note that Webber involved only a bare judicial lien that had not been converted into a property interest by an action in assumpsit and writ of execution; Groves did not involve judicial liens at all but, rather, §522(f)(2) security interests, such as were considered in Security to be "property" within the meaning of the fifth amendment.

could have occurred because the statutory framework governing the transaction provided for precisely the kind of avoidance rights now asserted by appellees.

Unfortunately, the majority's approach not only appears to decide constitutional questions that, under Security, might better be left unresolved; in my view, it also is wrong. I do not believe that the 1898 Act can be so blithely equated with the 1978 Act or that the Bank may be said to have had notice of the substance of section 522(f)(1) before that section became law.

It is perfectly true that

section 67(f) of the 1898 Bankruptcy Act provided for automatic invalidation of judicial liens; that provision, however, applied only to "levies, judgments, attachments, or other liens, obtained through leal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him..." 11 U.S.C.A. §107(f)(West 1927).

The 1898 Act, therefore, put judgment creditors at risk for only four months. Moreover, the statute in effect in the 1970s, as amended in 1956, provided:

> Every lien against the property of a person

> obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this title: Provided, however, That if such person is not finally adjudged a bankrupt in any proceeding under this title and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had been nullified and voided.

11 U.S.C. §107(a)(1) (1976). Thus, the property interest in this case

was created subject to a statutory framework that notified the judgment creditor of the risk of avoidability of his lien only during a four month period and only if the judgment debtor had been insolvent at the time the lien was obtained or if the lien was sought and permitted in fraud of other provisions of the Bankruptcy Act.

It therefore would appear that the avoidability provisions of the 1898 Bankruptcy Act, as amended, differed significantly from section 522(f)(1). The 1978 Act places no temporal limitation on avoidability; nor does it contain the other two restrictions found in section

107(a)(1) of the predecessor statute. Accordingly, I cannot agree that the 1898 Act provided the Commonwealth National Bank with notice of the substance of section 522(f)(1), and I therefore reject this route as a way of avoiding the holding of Security Industrial Bank.

This case, therefore, involves a property interest created before the effective date of the 1978 Bankruptcy Act, at a time when applicable law provided for avoidability of judicial liens under conditions substantially different from those now codified in section 522(f)(1). Given these facts, I see no way around Security Industrial

Bank. In order to avoid deciding the constitutional takings clause issues posed by retroactive application of section 522(f)(2), the Supreme Court construed that section to apply only to liens created after the enactment (or effective) date of the 1978 Bankruptcy Act. In the absence of contrary legislative intent, I am constrained to follow the same course here and to construe section 522(f)(1) in the Ashe case prospectively only. I therefore conclude that section 522(f)(1) does not apply to the lien held by the Bank on the Ashes' property. Accordingly, I dissent from the

judgment in Ashe.

III. Conclusion

For the reasons expressed above, I concur in the judgments in Dobslaw and Burkholder; I also concur, albeit with great reluctance, in the judgment of Bosworth. I dissent, however, from the judgment in Ashe.

SUR PETITION FOR REHEARING

Before SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTTHAM, SLOVITER and BECKER, Chief Judges.

The petition for rehearing filed by appellant The Commonwealth National Bank in the above entitled cases having been submitted to the judges who participated in the

decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Circuit Judges ADAMS, JAMES HUNTER, III, GARTH and BECKER would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1629

In re: CHARLES E. ASHE and SUSAN J. ASHE
t/a C & S FUEL SERVICE,
Debtors

THE COMMONWEALTH NATIONAL BANK,
Objector

v.

UNITED STATES OF AMERICA,
Intervenor

The Commonwealth National Bank,
Creditor-Objector,
Appellant

(D.C. Bankruptcy No. 1-79-00882)

No. 82-1434

THE COMMONWEALTH NATIONAL BANK

v.

ROBERT G. DOBSLAW and LYNNORE W. DOBSLAW,
individually and t/a VIDEO PL

The Commonwealth National Bank,
Appellant

(Bankruptcy Court No. 81-01177T)

No. 82-1435

In Re: AARON FRANKLIN BURKHOLDER and
ANNA MARY BURKHOLDER, husband and wife,
Debtors

The Commonwealth National Bank,
Appellant

(Bankruptcy Court No. 81-03570)

No. 82-1436

In Re: PAUL S. BOSWORTH and
MABEL G. BOSWORTH

The Commonwealth National Bank
Appellant

(Bankruptcy Court No. 81-02727)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges

The petition for rehearing filed by appellant The Commonwealth National Bank in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams, Hunter, Garth and Becker would grant the petition for rehearing.

By the Court,

Judge

Dated: August 3, 1983

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
READING DISTRICT

In re:

AARON FRANKLIN BURKHOLDER
and ANNA MARY BURKHOLDER

Case No. 81-03570 T

MEMORANDUM AND ORDER

FINDINGS OF FACT

1. The debtors filed a voluntary petition seeking relief under Chapter 7 of the Bankruptcy Code on September 4, 1981.

2. In the schedules accompanying the petition, the debtor claimed as exempt their interest in property located at 217 Raspberry Lane, Lititz, Pennsylvania.

3. Pursuant to 11 U.S.C. §522 (f)(1)(1979), the debtors have filed an application to avoid the judicial lien of The Commonwealth National Bank (hereinafter, the lienor) to the extent that lien impairs the debtors' exemption.

4. In February, 1979, the lienor docketed a judgement by confession with the Prothonotary of Lancaster County. The docketing of the judgement created a lien on all real property of the debtors. 42 Pa. Cons. Ann. §4303 (Purdon 1980).

5. The lienor has objected to the debtors' proposed lien avoidance based upon the following:

(x) A. That its lien is not a judicial lien;
(x) B. That Section 522 (f)(1) is an unconstitutional retroactive taking of property.

CONCLUSIONS OF LAW

1. The debtors are entitled to exempt their interest in property as claimed. 11 U.S.C. §522 (d)(1)(1979).

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1. This memorandum constitutes the findings of fact and conclusions of law as required by Rule 752 of the Rules of Bankruptcy Procedure.

2. The lienor's lien is a judicial lien, and impairs the debtor claimed exemption. In re Ashe, 699 F.2d 105 (Jan. 6, 1982); In re Burkholder, 11 B.R. 346 (Bk. E.D. Pa. 1981).

3. Section 522 (f) is constitutional as applied to the facts of this case. In re Ashe, 699 F.2d 105 (Jan. 6, 1982); In re Burkholder, 11 B.R. 346 (E.D. Pa. 1981).

ORDER

THEREFORE, this 23rd day of April, 1982, in accordance with the foregoing Memorandum, it is ORDERED, that the debtors' application to avoid the judicial lien of Commonwealth National Bank to the extent that lien impairs the debtors' claimed exemption of property located at 217 Raspberry Lane, Lititz, Pennsylvania, is GRANTED.

Reading, Pa.

THOMAS M. TWARDOWSKI
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
READING DIVISION

In Re:	:	
ROBERT G. DOBSLAW and LYNNORE W. DOBSLAW, individually and t/a VIDEO PL., Debtors	:	Case No. 81-01177 T
THE COMMONWEALTH NATIONAL BANK, Plaintiff	:	
v.	:	
ROBERT G. DOBSLAW and LYNNORE W. DOBSLAW, Defendants	:	

MEMORANDUM AND ORDER

FINDINGS OF FACT

1. The debtors filed a voluntary petition seeking relief under Chapter 7 of the Bankruptcy Code on April 2, 1981.[1]

2. In the schedules accompanying the petition, the debtors claimed as exempt their interest in property located at 110 Ridings Way, Lancaster County, Pennsylvania.

3. Pursuant to 11 U.S.C. §522 (f)(1)(1979), the debtors have filed an application to avoid the judicial lien of Commonwealth National Bank (hereinafter, the lienor) to the extent that lien impairs the debtors' exemption.

4. On October 29, 1979, and June 12, 1980, the lienor docketed judgments by confession with the Prothonotary of

1. This memorandum constitutes the Findings of Fact and Conclusions of Law as required by Rule 752 of the Rules of Bankruptcy Procedure.

Lancaster County. The docketing of the judgments created a lien on all real property of the debtors. 42 Pa. Cons. Ann. §4303 (Purdon 1980).

5. The lienor has objected to the debtors' proposed lien avoidance based upon the following:
   (x) A. that its lien is not a judicial lien;
   (x) B. that Section 522 (f) is an unconstitutional retroactive taking of property.

CONCLUSIONS OF LAW

1. The debtors are entitled to exempt their interest in property as claimed. 11 U.S.C. §522 (d)(1)(1979).

2. The lienor's lien is a judicial lien, and impairs the debtor claimed exemption, In re Ashe, ___F.2d___ (Jan. 6, 1982); In re Burkholder, 11 B.R. 346 (BK.E.D. Pa. 1981).

3. Section 522 (f) is constitutional as applied to the facts of this case. In re Ashe, ___F.2d___ (Jan.6, 1982); In re Burkholder, 11 B.R. 346 (E.D. Pa. 1981).

ORDER

THEREFORE, this 23rd day of February, 1982, in accordance with the foregoing Memorandum, it is ORDERED, that the debtors' Application to avoid the judicial lien of Commonwealth National Bank to the extent that lien impairs the debtors' claimed exemption of property located at 110 Ridings Way, Lancaster County, Pennsylvania, is GRANTED.

Reading, Pa.

THOMAS M. TWARDOWSKI
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
READING DISTRICT

In re:

PAUL S. BOSWORTH
and MABEL G. BOSWORTH

Case No. 81-02727 T

MEMORANDUM AND ORDER

FINDINGS OF FACT

1. The debtors filed a voluntary petition seeking relief under Chapter 7 of the Bankruptcy Code on July 13, 1981.[1]

2. In the schedules accompanying the petition, the debtors claimed as exempt their interest in property located at 719 Manor Street, Lancaster, Pennsylvania.

3. Pursuant to 11 U.S.C. §522 (f)(1)(1979), the debtors have filed an application to avoid the judicial lien of The Commonwealth National Bank (hereinafter, the lienor) to the extent that lien impairs the debtors exemption.

4. On April 27, 1978, the lienor docketed a judgement by confession with the Prothonotary of Lancaster County. The docketing of the judgement created a lien on all real property of the debtors. 42 Pa. Cons. Ann. §4303 (Purdon 1980).

5. The lienor has objected to the debtor proposed lien avoidance based upon the following:
   (x) A. that its lien is not a judicial lien;
   (x) B. that Section 522 (f)(1) is an unconstitutional retroactive taking of property.

CONCLUSIONS OF LAW

1. The debtors are entitled to exempt their interest in property as claimed. 11 U.S.C. §522 (d)(1)(1979).

2. The lienor's lien is a judicial lien, and impairs the

1. This memorandum constitutes the findings of fact and conclusions of law as required by Rule 752 of the Rules of Bankruptcy Procedure.

debtors' claimed exemption. In re Ashe, 699 F. 2d 105 (Jan. 6, 1982); In re Burkholder, 11 B.R. 346 (Bk. E. D. Pa. 1981).

3. Section 522 (f) is constitutional as applied to the facts of this case. In re Ashe, 699 F.2d 105 (Jan. 6, 1982), In re Burkholder, 11 B.R. 346 (E.D. Pa. 1981).

ORDER

THEREFORE, this 23 day of April, 1982, in accordance with the foregoing Memorandum, it is ORDERED, that the debtors' application to avoid the judicial lien of the Commonwealth National Bank to the extent that lien impairs the debtors' claimed exemption of property located at 719 Manor Street, Lancaster, Pennsylvania, is GRANTED.

Reading, Pa.

THOMAS M. TWARDOWSKI
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:	:	
CHARLES E. ASHE and SUSAN J. ASHE, husband and wife, Debtors	:	BK NO. 1-79-00882
THE COMMONWEALTH NATIONAL BANK, Objector	:	
UNITED STATES OF AMERICA, Intervenor	:	

MEMORANDUM AND ORDER

AVOIDING LIEN

This proceeding presents the issue of the constitutionality of retroactive application of section 522(f)(1) of the Bankruptcy Reform Act of 1978 (the Code) to a Pennsylvania judgment lien obtained by confession of judgment on a promissory note received from the debtors in a commercial loan transaction.

The transaction and the entry of judgment occurred on December 28, 1973. Upon entry of the judgment, Commonwealth National Bank (the Bank) automatically obtained a lien on debtors' residential real estate. Clark v. Custer, 54 Pa. 215 (1867); Sellers v. Burk, 47 Pa. 344 (1864). Act of July 3, 1947, P.L. 1234, §2, 12 P.S. §§2 (current version at 42 Pa. C.S.A. §4303 (1976)). It was the only real estate the debtors owned at the time. The debtors filed a bankruptcy petition on October 10, 1979. They claim a $15,000 exemption in their residential real estate under section 522(d)(1) of the Code. Due to the fact that the Bank's judgment lien impairs the debtors' exemption, debtors seek to avoid the fixing of the lien pursuant to section 522(f)(1), which provides as follows:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is (1) a judicial lien; . . . .

the issue of avoidance is not raised in the pleadings, but counsel have agreed that it be determined at this juncture, in order to expedite resolution.

The Bank objects to avoidance of its lien for two reasons. First, it argues that its lien is not a judicial lien. Second, it argues that, if the lien is a judicial lien, avoidance is dependent on retroactive application of the Code and that such application violates the Fifth Amendment of the Constitution by depriving the Bank of a property right without substantive due process of law.

NATURE OF LIEN

The threshold question is the nature of the lien involved. The Bank's position is that the lien is a security interest, or a statutory lien. It has been determined in this District and elsewhere in Pennsylvania that a lien obtained by confession of judgment is a judicial lien. In re Smith, Bk No. 5-80-00081 (M.D. Pa. Bk Ct., Dec. 10, 1980); In re Fainhizer, Adv. No. 1-80-0050 (M.D. Pa. Bk Ct., July 8, 1980); In re Natale, 5 B.R. 454 (E.D. Pa. Bk Ct. 1980); see also, 4 Collier on Bankruptcy 116, 667.08, ftnt. 1 (14th ed. 1978). Being a judicial lien, it is subject to avoidance provided that avoidance is not constitutionally proscribed.

AVOIDANCE OF PRE-CODE LIEN

The Bankruptcy powers of Congress are established in the Constitution U.S. Const., Art. I, §8. However, they are not unfettered. Where property rights are involved, the exercise of the Congress' power to legislate in the field of Bankruptcy is subject to a limitation imposed by the Fifth Amendment which provides that "No person...shall be...deprived of life, liberty, or property, without due process of law...." Specific property rights held prior to legislative enactment may not be taken without just compensation. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (1935); Ginsberg v. Lindel, 107 F.2d 721 (8th Cir. 1939). See also, 8 C.J.S., Bankruptcy § 5.

The crucial question remains: Is the Bank's lien within the scope of the protection established by Radford? In the resolution of this question

every presumption of constitutionality to which the statute is susceptible should be applied, for the presumption of constitutionality is a strong one. U.S. v. Butler, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed 210 (1948).

The general issue which confronts us was determined in another bankruptcy court recently in the case In re Oldham, 7 B.R. 124 (1980), decided November 19, 1980. There the Court held that retroactive application of the lien avoidance provision of the Code is unconstitutional in that it deprives holders of liens created before the Code's enactment date of their property without due process. In discussing the constitutionality issue, the Court relied on Radford and the recent cases of In re Hoops, 3 B.R. 635 (Colo. 1980) and Pedrock v. Security Industrial Bank, 3 B.R. 629 (Colo. 1980). The Court concluded that "the directive of Radford is inescapable: the bankruptcy power of Congress is subject to the Fifth Amendment, and bankruptcy legislation which substantially impairs pre-existing security interests is unconstitutional."

We consider that the ruling of Radford is firmly entrenched, but there is a significant difference between the property interest in Radford and the lien here involved. In Radford, the creditor held a mortgage. The creditor's interest was an actual property right at its inception: it was both choate and specific upon the execution of the mortgage.

In contrast, the Bank's lien in the case before us is general and, non-specific. Under Pennsylvania law:

> ...a judgment is a general and not a specific lien. If there be personal property of the debtor it is to be satisfied out of that. If not it is a lien on all his real estate without discrimination. Hence, the creditor is not interested in the property as property, but only in his lien.

Clevenger v. Southern Mutual Fire Insurance Co., 62 Pa. 340 (1867). The Bank did not obtain either a legal or an equitable right in the debtors' residence at the inception of the transaction with the debtors. It obtained a judgment which established a lien on whatever real property the judgment debtor had at the time of judgment entry. Furthermore, contrary to its claim, the Bank did not obtain a security interest. The Code defines a security interest as "...a lien created by agreement." Sec 101(37). The Bank's lien is a charge against property, but it is not an interest in property.

We consider that the Radford umbrella shields property interests which are contractually specific in the sense that the property interest in Radford was specific. The lien of the plaintiff is not such an interest. For that reason, it is our decision that avoidance is not constitutionally proscribed as claimed by the Bank.

We have considered the extensive briefs of all parties, including those of the United States, intervenor, and the amicus curiae. They are scholarly and have been helpful.

ORDER

AND NOW, this 11th day of March, 1981, it is determined that the judicial lien of the Commonwealth National Bank is avoidable. It is hereby avoided to the extent that it impairs the debtors' residential exemption.

BY THE COURT:

Thomas Hood
Bankruptcy Judge

HARRISBURG, PENNSYLVANIA

Supreme Court of the United States

No. 81-1866

Commonwealth National Bank,

Petitioner,

v.

Charles E. Ashe and Susan J. Ashe, etc., et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of United States v. Security Industrial Bank, 459 U.S. ____ (1982).

IT IS FURTHER ORDERED that the petitioner, Commonwealth National Bank, recover from Charles E. Ashe and Susan J. Ashe, etc., et al. Two Hundred Dollars ($200.00) for its costs herein expended.

December 13, 1982

Clerk's costs: $200.00

Davis, 371 U.S. 178, 181, 83 S.Ct. 227, 229, L.Ed.2d 222 (1962) (discussing a notice of appeal under Fed.Rule Civ.Proc. 73(a), the predecessor of Fed.Rule App.Proc. (4). See also *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387, 98 S.Ct. 1117, 1121, 55 L.Ed.2d 357 (1978) (*per curiam*) ("the technical requirements [imposed by the Rules of Appellate Procedure] for a notice of appeal were not mandatory where the notice 'did not mislead or prejudice' ").

The Court's interpretation of Rule 4(a)(4) also creates new and serious pitfalls for *pro se* and other unsophisticated litigants. The reports are filled with cases in which litigants filed post-judgment motions to "reconsider," to "vacate," to "set aside," or to "reargue" adverse judgments. The lower courts have almost without exception treated these as Rule 59 motions, *regardless of* their label.[7] Indeed, even motions captioned under Rule 60(b), but filed within 10 days of judgment, are normally deemed Rule 59 motions.[8] According to the majority, a notice of appeal becomes a "nullity" if it is filed while a Rule 59 motion is pending. Thus, under the majority's approach, litigants could unwittingly file invalid notices of appeal simply because they had previously filed a motion questioning a District Court judgment which, unbeknownst to them, is a Rule 59 motion. The mere failure to appreciate the distinction between a Rule 59 motion and a Rule 60(b) motion, when combined with the draconian application of Rule 4(a)(4) adopted by the majority, would *require* the dismissal of an appeal. See, *e.g.*, *Apel v. Wainwright*, 677 F.2d 116 (CA11, 1982) (on petition for rehearing), petition for cert. pending, No. 82-5503.

III

If the Court believes, as I do not, that it is necessary in this case to examine the Court of Appeals' interpretation of Rule 2, I would at least notify the parties that the Court is considering a summary disposition, so that they may have an opportunity to submit briefs on the merits. Without such briefing, the risk of error necessarily increases. I therefore dissent.

UNITED STATES, Appellant,

v.

SECURITY INDUSTRIAL BANK et al.

No. 81-184.

Argued Oct. 6, 1982.

Decided Nov. 30, 1982.

In a series of bankruptcy cases involving the application of lien avoidance statute, debtors appealed from judgments of the United States Bankruptcy Court for the District of Colorado, John P. Moore, J., 3 B.R. 629; Glen E. Keller, Jr., J., 3 B.R. 635; John F. McGrath and Patricia Ann Clark, JJ., 4 B.R. 293; and from the United States Bankruptcy Court for the District of Kansas, James A. Pusateri, J., 8 B.R. 12. The Court of Appeals, 642 F.2d 1193, affirmed, and appeal was taken. The Supreme Court, Justice Rehnquist, held that lien avoidance statute was not intended to be applied retroactively to destroy property rights predating enactment of Bankruptcy Code.

7. See 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 204.12 at 4-67 & n. 26 (2d ed. 1982). In the Third Circuit alone, see, *e.g.*, *Richerson v. Jones*, 572 F.2d 89, 93 (CA3 1978) (motion to reconsider judgment); *Sonneblick-Goldman Corp. v. Norwalk*, 420 F.2d 858, 859 (CA3 1970) (motion to vacate judgment); *Garney v. Brotherhood of Railway & Steamship Clerks*, 303 F.2d 716, 718 (CA3 1962) (motion for rehearing or reconsideration). Sometimes the characterization has resulted in the dismissal of an appeal.

8. *E.g.*, *Dove v. Codesco*, 569 F.2d 807 (CA4 1978); *Alley v. Dodge Hotel*, 551 F.2d 442 (CADC 1977); *Sea Ranch Ass'n v. California Coastal Zone Conservation Commissions*, 537 F.2d 1058 (CA9 1976); *Woodham v. American Cystoscope Co.*, 335 F.2d 551 (CA5 1964).

Affirmed.

Justice Blackmun filed a concurring opinion in which Justices Brennan and Marshall joined.

1. **Eminent Domain** ⇐2(1.1)

Bankruptcy power is subject to Fifth Amendment's prohibition against taking private property without compensation. U.S.C.A. Const.Amend. 5.

2. **Constitutional Law** ⇐48(4)

Where there was substantial doubt whether retroactive destruction of creditors' liens would comport with Fifth Amendment, cardinal principle that the Supreme Court will first determine whether construction of statute is fairly possible by which constitutional question may be avoided warranted consideration of whether, as matter of statutory construction, lien avoidance statute must necessarily be applied retroactively. Bankr.Code, 11 U.S.C.A. § 522(f)(2); U.S.C.A. Const.Amend. 5.

3. **Bankruptcy** ⇐6

No bankruptcy law shall be construed to eliminate property rights which existed before law was enacted in absence of explicit command from Congress.

4. **Bankruptcy** ⇐6, 398(1)

Lien avoidance statute was not intended to be applied retrospectively to destroy property rights predating enactment of the Bankruptcy Code. Bankr.Code, 11 U.S.C.A. § 522(f)(2).

*Syllabus**

A provision of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 522(f)(2) (1976 ed., Supp. V), permits individual debtors in bankruptcy proceedings to avoid nonpossessory, nonpurchase-money liens on certain property, including household furnishings and appliances. Appellees loaned individual debtors money and obtained and perfected such liens on the debtors' household furnishings and appliances before the 1978 Act was enacted. Subsequently, these debtors instituted separate bankruptcy proceedings under the 1978 Act. Sections 522(b) and (d) exempt household items from the property included within debtors' estates. The debtors claimed these exemptions, relying on § 522(f)(2) to avoid the liens. The Bankruptcy Courts refused to apply § 522(f)(2) retroactively to abrogate the liens. The Court of Appeals in consolidated appeals affirmed, holding that, although the 1978 Act was intended to apply retrospectively and thus was designed to invalidate liens acquired before the enactment date, such an application violates the Takings Clause of the Fifth Amendment.

Held: Section 522(f)(2) was not intended to be applied retrospectively to destroy pre-enactment property rights. Pp. 410–414

(a) Where there is substantial doubt whether retroactive destruction of appellees' liens would comport with the Fifth Amendment, the cardinal principle that this Court will first determine whether a construction of a statute is fairly possible by which the constitutional question may be avoided warrants a consideration of whether, as a matter of statutory construction, § 522(f)(2) must necessarily be applied retroactively. Pp. 410–412.

(b) No bankruptcy law shall be construed to eliminate property rights that existed before the law was enacted in the absence of an explicit command from Congress. In light of this principle, in the absence of a clear expression of Congress' intent to apply § 522(f)(2) to property rights established before the enactment date, the statute will not be construed in a manner that could call upon this Court to resolve difficult and sensitive questions arising out of the guarantees of the Takings Clause. P. 414.

642 F.2d 1193, (10th Cir.) affirmed.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. *See United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Alan I. Horowitz, Washington, D.C., for appellant.

Henry F. Field, Chicago, Ill., for appellees.

Justice REHNQUIST delivered the opinion of the Court.

This case concerns the effect of 11 U.S.C. § 522(f)(2), which permits individual debtors in bankruptcy proceedings to avoid liens on certain property. The Court of Appeals consolidated seven appeals from the Bankruptcy Courts for the Districts of Kansas and Colorado. In each case the debtor was an individual who instituted bankruptcy proceedings after the Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549 ("the 1978 Act"), became effective on October 1, 1979. In each case one of the appellees had loaned the debtor money and obtained and perfected a lien on the debtor's household furnishings and appliances before the 1978 Act was enacted on November 6, 1978. None of these liens was possessory, and none secured purchase-money obligations.

Included within the personal property subject to the appellees' liens were household items that are exempt from the property included within the debtors' estates by virtue of subsections (b) and (d) of § 522.[1] The debtors claimed these exemptions in their respective bankruptcy proceedings, relying on § 522(f)(2) to avoid the liens. That section provides:

"Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(2) a nonpossessory, nonpurchase-money security interest in any—

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor."

The appellees asserted that application of § 522(f)(2) to liens acquired before the enactment date would violate the Fifth Amendment. The United States intervened in each case to defend the constitutionality of the federal statute,[2] but the bankruptcy courts in each case refused to apply § 522(f)(2) to abrogate liens acquired before the enactment date.[3]

1. The exemptions were designed to permit individual debtors to retain exempt property so that they will be able to enjoy a "fresh start" after bankruptcy.

Subsections (b) and (d) of § 522 provide in pertinent part:

(b) [A]n individual debtor may exempt from the property of the estate . . . (1) property that is specified under subsection (d) of this section.

(d) The following property may be exempted under subsection (b)(1) of this section:

(3) The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or the dependent of the debtor.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(9) Professionally described health aids for the debtor or a dependent of the debtor.

2. See 28 U.S.C. § 2403(a).

3. In *Schulte v. Beneficial Finance of Kansas, Inc.*, and *Hunter v. Beneficial Finance of Kansas, Inc.*, 8 B.R. 12, the Bankruptcy Court for the District of Kansas noted that retrospective application of § 522(f)(2) creates constitutional problems and held that it should be applied only prospectively. In *Jackson v. Security Industrial Bank, Stevens v. Liberty Loan Corp.*, 4 B.R. 293, *Rodrock v. Security Industrial Bank,*

The Court of Appeals consolidated the cases and affirmed the judgments of the bankruptcy courts. 642 F.2d 1193, 1195 (CA10 1981). It held that the 1978 Act was intended to apply retrospectively, and thus was designed to invalidate liens acquired before the enactment date. It also held, however, that such an application violates the Fifth Amendment. The court stated that § 522(f)(2) effects a "complete taking of the secured creditors' property interest," and is thus invalid under *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed.2d 1593 (1935).[4] The United States appealed, and we noted probable jurisdiction. — U.S. ——, 102 S.Ct. 969, 71 L.Ed.2d 108 (1982).

The appellees, of course, defend the judgment of the Court of Appeals.[5] The government argues at some length that retrospective application of § 522(f)(2) to these liens would not violate the Fifth Amendment. It contends that the enactment is a "rational" exercise of Congress' bankruptcy power, that for "bankruptcy purposes" property interests are all but indistinguishable from contractual interests, that these particular interests were "insubstantial" and therefore their destruction does not amount to a "taking" of property requiring compensation. We do not decide the constitutional question reached by the Court of Appeals. We address it only to determine whether the attack on the retrospective application of the statute raises substantial enough constitutional doubts to warrant th employment of the canon of statutory con struction referred to *post*, 8–10.

[1] It may be readily agreed tha § 522(f)(2) is a rational exercise of Con gress' authority under Article I, Section Clause 4, and that this authority has bee regularly construed to authorize the retro spective impairment of contractual oblig tions. *Hanover National Bank v. Moyse* 186 U.S. 181, 188, 22 S.Ct. 857, 860, 46 L.Ed 1113 (1902). Such agreement does no however, obviate the additional difficult that arises when that power is sought to b used to defeat traditional property inter ests. The bankruptcy power is subject t the Fifth Amendment's prohibition agains taking private property without compensa tion. *Louisville Joint Stock Land Bank Radford*, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed 1593 (1935). Thus, however "rational" th exercise of the bankruptcy power may b that inquiry is quite separate from th question whether the enactment takes prop erty within the prohibition of the Fift Amendment.

The government apparently contend (Brief for the United States, at 30–32) tha because cases such as *Arnett v. Kenned* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 1 (1974) and *Goldberg v. Kelly*, 397 U.S. 25 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) define "property" for purposes of the Due Proces Clause sufficiently broadly to include right

and *Knezel v. Security Industrial Bank*, 3 B.R. 629, the Bankruptcy Court for the District of Colorado concluded that § 522(f)(2), as applied retrospectively, violates the Due Process Clause of the Fifth Amendment. In *Hoops v. Freedom Finance*, 3 B.R. 635, the Bankruptcy Court for the District of Colorado concluded that § 522(f)(2), as applied retrospectively, violates "substantive due process."

4. *In re Gifford*, 688 F.2d 447, (CA7 1982) (en banc), holds that § 522(f)(2) constitutionally applies to liens created before the enactment date. *In re Webber*, 674 F.2d 796 (CA9 1982), holds that § 522(f)(2) constitutionally applies to liens created before the Act became effective but after the enactment date. *In re Ashe*, 669 F.2d 105 (CA3 1982), holds that § 522(f)(1), which permits avoidance of certain judicial liens, constitutionally applies to a cognovit not created before the enactment date.

5. Appellee Beneficial Finance of Kansas, In asserts that the judgments should be affirme because the Act violates Article III of the Co stitution by granting judicial power to non-Ar cle III bankruptcy judges. *See Northern Pip line Construction Co. v. Marathon Pipe Li Co.*, — U.S. ——, 102 S.Ct. 2858, 73 L.Ed.2 598 (1982) (plurality opinion of BRENNAN, J. *id.*, at — , 102 S.Ct., at 2882 (REHNQUIST, J. concurring in the judgment). Because our d cision in *Northern Pipeline* is prospective onl *id.*, at — —, 102 S.Ct. 288, and because w have stayed the issuance of our mandate i that case to December 24, 1982, — U.S. — 103 S.Ct. 99, 73 L.Ed.2d ——, that decisi does not affect the judgment in this case.

which at common law would have been deemed contractual, traditional property rights are entitled to no greater protection under the takings clause than traditional contract rights. It argues that "bankruptcy principles do not support a sharp distinction between the rights of secured and unsecured creditors." Brief for the United States, at 31. However "bankruptcy principles" may speak to this question, our cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral. Compare *Hanover National Bank v. Moyses, supra,* with *Louisville Joint Stock Land Bank v. Radford, supra,* and *Kaiser-Aetna v. United States,* 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

Since the governmental action here would result in a complete destruction of the property right of the secured party, the case fits but awkwardly into the analytic framework employed in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) and *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), where governmental action affected some but not all of the "bundle of rights" which comprise the "property" in question. The government argues that the interest of a secured party such as was involved here is "insubstantial," apparently in part because it is a nonpurchase-money, non-possessory interest in personal property. The "bundle of rights" which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but the government cites no cases supporting the proposition that differences such as these relegate the secured party's interest to something less than property.[6] And our decisions in *Radford, supra,* and *Armstrong v. United States,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1961), militate against such a proposition.

In *Radford,* we held that the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, violated the takings clause. The bank held a nonpurchase-money mortgage on Radford's farm. Radford defaulted and instituted bankruptcy proceedings. The Frazier-Lemke Act, which by its terms applied only retrospectively, permitted the debtor to purchase the property for less than its fair market value.[7] We held the statute was void because it effected a "taking of substantive rights in specific property acquired by the Bank prior to" its enactment. 295 U.S., at 590, 55 S.Ct. at 863. In his opinion for the Court, Justice Brandeis stated:

> "[T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just

6. At oral argument the government conceded that the liens at issue in this case are treated as property under state law. Tr. Oral Arg., at 21.

Both Kansas and Colorado have adopted the Uniform Commercial Code. Although under the Code the priority among secured parties is often affected by the purchase money or possessory character of security interests, see, *e.g.,* § 9-312, these characterizations do not affect the nature of the security interest. See §§ 9-107 (defining "purchase money security interest"), 9-305 (providing for perfection of security interests by possession).

Section 101(28) of the 1978 Act defines a lien as a "charge against or interest in property to secure payment of a debt or performance of an obligation." It does not make distinctions based on the purchase-money or possessory nature of a lien.

7. The Frazier-Lemke Act permitted the farmer, if the mortgagee assented, to purchase the property at its then appraised value on a deferred payment plan. If the mortgagee refused to assent, the court was required to stay all proceedings for 5 years, during which time the farmer could retain possession by paying a reasonable rent. After 5 years the property could be reappraised, but the farmer still had the right to purchase it free and clear for the appraised value regardless of the amount of the lien. See *Radford, supra,* 295 U.S., at 557-558, 55 S.Ct., at 855. Given the interest rate of 1%, the present value of the deferred payments was much less than the value of the property. *Id.,* at 591-593, 55 S.Ct., at 864-65.

compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public." *Id.*, at 602, 55 S.Ct., at 869.

In *Armstrong*, materialmen delivered materials to a prime contractor for use in constructing navy personnel boats. Under state law, they obtained liens in the vessels.[8] The prime contractor defaulted on his obligations to the United States, and the government took title to and possession of the uncompleted hulls and unused materials, thus making it impossible for the materialmen to enforce their liens. We held that this constituted a taking:

"The total destruction by the government of all compensable value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." 364 U.S., at 48, 80 S.Ct., at 1568–69.

The government seeks to distinguish *Armstrong* on the ground that it was a classical "taking" in the sense that the government acquired for itself the property in question, while in the instant case the government has simply imposed a general economic regulation which in effect transfers the property interest from a private creditor to a private debtor. While the classical taking is of the sort that the government describes, our cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself. See *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *PruneYard Shopping Center v. Robins*, *supra*; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

The government finally contends that because the resale value of household goods is generally low, and because creditors therefore view the principal value of their security as a lever to negotiate for reaffirmation of the debt rather than as a vehicle for foreclosure, the property interests involved here do not merit protection under the takings clause. While this contention cannot be dismissed out of hand, it seems to run counter to the state's characterization of the interest as property, see note 5, *supra*, to our reliance in other "takings" cases on state law characterizations, see, *e.g.*, *Kaiser-Aetna v. United States*, *supra*, 444 U.S. 164, 179, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 and also to at least some of the implications of *Radford*, *supra*, and *Armstrong*, *supra*.

[2] The foregoing discussion satisfies us that there is substantial doubt whether the retroactive destruction of the appellees' liens in these cases comports with the Fifth Amendment. We now consider whether, as a matter of statutory construction, § 522(f)(2) must necessarily be applied in that manner. We consider the statutory question because of the " 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.' " *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978), quoting *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932).

The Court of Appeals thought § 522(f)(2) must apply retroactively, that is, to liens which attached before the enactment date, because "there would be *no* bankruptcy law applicable to cases involving such liens if it did not." 642 F.2d, at 1197. The court apparently thought that if § 522(f)(2) does not apply to liens which came into existence before the enactment date, then no part of the 1978 Act could apply to cases involving such liens. This is not necessarily the case. The liens, of course, exist under state law

8. Under the Uniform Commercial Code definition, these statutory liens would be nonpossessory, nonpurchase-money liens in personal property. See note 5, *supra*.

independently of the 1978 Act. Although the 1978 Act, in general, is effective for all cases commenced after its effective date, Congress might have intended that provisions that destroy previously vested property rights apply only to interests that came into effect after the enactment date. If § 522(f)(2) is such a provision, the remainder of the 1978 Act would not affect the enforceability of these liens, but would still apply to these liens and these cases. We think that the analysis of the Court of Appeals did not adequately dispose of the question as to the retrospective effect of § 522(f), and we therefore pursue the inquiry further.

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. *Compare* Sands, Sutherland's Statutory Construction § 106 *with Linkletter v. Walker*, 381 U.S. 618, 622–625, 85 S.Ct. 1731, 1733–35, 14 L.Ed.2d 601 (1965). This Court has often pointed out that

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past.... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913) (citations omitted). See, *e.g.*, *United States Fidelity & Guaranty Co. v. Struthers Wells Co.*, 209 U.S. 306, 314, 28 S.Ct. 537, 539, 52 L.Ed. 804 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other."); *United States v. The Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

This principle has been repeatedly applied to bankruptcy statutes affecting property rights. In *Holt v. Henley*, 232 U.S. 637, 34 S.Ct. 459, 58 L.Ed. 767 (1914), the Court had before it a new statute granting bankruptcy trustees the position of a lienholder with priority over sellers on conditional sales contracts. Act of June 25, 1910, c. 412, § 8, 26 Stat. 838, 840. This provision, like § 522(f)(2), could be read literally to divest property interests which had been created before it was enacted. The 1910 statute, like the 1978 Act, applied to all bankruptcy cases instituted after it became effective.[9] Nonetheless, the Court followed the lead of the lower courts in refusing to infer retroactivity absent an explicitly "expressed intent of Congress." *Arctic Ice Machine Co. v. Armstrong County Trust Co.*, 192 F. 114, 116 (CCA 3 1911). See also *In re Schneider*, 203 F. 589, 590 (E.D.Pa.1913). In his opinion for the unanimous Court, Justice Holmes stated "that the reasonable and usual interpretation of [bankruptcy] statutes is to confine their effect, so far as it may be, to property rights established after they were passed." 232 U.S., at 639, 34 S.Ct., at 460. See *Auffm'ordt v. Rasin*, 102 U.S. 620, 622, 26 L.Ed. 262 (1881).

The government nonetheless contends that bankruptcy statutes are usually construed to apply to preexisting rights. This statement is unobjectionable in the context of traditional contract rights, *Hanover National Bank v. Moyses*, *supra*, 186 U.S., at 188, 22 S.Ct., at 860–61, but none of the cases cited by the government extend it to property rights such as those involved here.[10]

9. The transition provisions of the 1910 statute, *id.*, § 14, 36 Stat. at 842, are, in substance, the same as those of the 1978 Act. Pub.L. No. 95-598, Title IV, §§ 402, 403(a), Nov. 6, 1978, 92 Stat. 2682, 2683.

10. *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 65 S.Ct. 172, 89 L.Ed. 139 (1944), involved rights to certain tax benefits, not to property rights. *Dickinson Industrial Site, Inc. v. Cowan*, 309 U.S. 382, 383, 60 S.Ct. 595, 596, 84 L.Ed. 819 (1940), dealt with the application of new procedural rules to a bankruptcy proceeding that was pending when the new statute was enacted. Allowing an appeal to the Circuit Court rather than the District Court in that

[3, 4] Neither these cases, nor any other that has come to our attention, casts doubt on the principle of statutory construction deducible from *Holt* and *Auffm'ordt*: No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress. In light of this principle, the legislative history of the 1978 Act suggests that Congress may not have intended that § 522(f) operate to destroy pre-enactment property rights.

An early version of the 1978 Act contained an explicit requirement that all its provisions "shall apply in all cases or proceedings instituted after its effective date, regardless of the occurrence of any of the operative facts determining legal rights, duties or liabilities hereunder." H.R. 31, 94th Cong., 1st Sess., § 10 103(a) (1975), reprinted in Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Right of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975), n. 14 app., at 320-321. This provision may or may not have been deleted directly in response to the comments of witness William Plumb to the effect that retroactive invalidation of liens may be an unconstitutional taking. *Id.*, at 2066-2067. Nonetheless, Congress's elimination of an explicit command is some ev dence that it did not intend to depart fro the usual principle of construction. S *Bradley v. Richmond School Board*, 416 U. 696, 716, n. 23, 94 S.Ct. 2006, 2018, n. 23, L.Ed.2d 476 (1974) ("We are reluctant read into the statute the very ... limit tion that Congress eliminated.").

"Accordingly, in the absence of a cle expression of Congress' intent to" app § 522(f)(2) to property rights establish before the enactment date,[11] "we decline construe the Act in a manner that could turn call upon the Court to resolve difficu and sensitive questions arising out of t guarantees of the" takings clause. *N. R.B. v. Catholic Bishop of Chicago*, 440 U. 490, 507, 99 S.Ct. 1313, 1322, 59 L.Ed.2d 5 (1979).[12] The judgment of the Court Appeals must therefore be

Affirmed.

Justice BLACKMUN, with whom Justi BRENNAN and Justice MARSHALL jo concurring in the judgment.

This case concerns the Bankruptcy Act 1978, 11 U.S.C. § 101 *et seq.* (1976 e Supp. V), and, in particular, the exempti provisions of § 522 of that Act. Specifie

case did not eliminate any property rights. *Carpenter v. Wabash Ry.*, 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940), involved a provision giving personal injury judgments the status of operating expenses and thus priority over mortgages in ongoing railroad reorganizations. Although that statute may have disadvantaged the mortgagees by reducing the amount of cash available to pay their notes, it did not affect their property right in the collateral securing the mortgages. *McKaddin v. Evans-Snider-Buel Co.*, 185 U.S. 505, 22 S.Ct. 758, 46 L.Ed. 1012 (1902), considered a curative statute providing the methods by which valid mortgages could be created in the Indian Territory. The *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 549-550, 20 L.Ed. 287 (1870), decided only that debts could be paid in legal tender as defined by Congress at the time of payment without impairing the obligation of contracts.

11. Because all of the liens at issue in this case were established before the enactment date we have no occasion to consider whether § 522(f)(2) should be applied to liens established after Congress passed the Act, but fore it became effective.

12. "When aid to construction of the meaning words, as used in the statute, is available, th certainly can be no 'rule of law' which forb its use, however clear the words may appear 'superficial examination.' Obviou there is danger that the courts' conclusion as legislative purpose will be unconsciously inf ended by the judges' own views or by facts not considered by the enacting body. A liv appreciation of the danger is the best assuran of escape from its threat but hardly justifies acceptance of a literal interpretation dog which withholds from the courts available formation for reaching a correct conclusion. few words of general connotation appearing the text of statutes should not be given a w meaning, contrary to a settled policy, 'exce ing as a different purpose is plainly shown *United States v. American Trucking Asso tion*, 310 U.S. 534, 543-544, 60 S.Ct. 10 1063-64, 84 L.Ed. 1345 (1940) (footnotes om ted).

ly at issue is the effect of certain of these exemption provisions upon nonpossessory, nonpurchase-money obligations given by debtors to small loan companies before the enactment of the Act. The purported liens apply generally, not specifically, to property of the kind described and, as a practicable matter, there is nothing to prevent the debtor's selling the property and replacing it or not replacing it, just as he chooses.

Section 522, for the first time, established a set of federal exemptions for individual debtors. Concededly, the section, as all similar statutes, was enacted to protect the debtor's essential needs and to enable him to have a fresh start economically. Section 522(f)(2) permits the debtor to "avoid the fixing" of a nonpossessory, nonpurchase-money security interest in certain property, but the subsection does not extend to all property otherwise exempt under § 522(d). It is limited to certain personal items, such as household furnishings, wearing apparel, jewelry, tools of the debtor's trade, and professionally prescribed health aids.

The Court naturally struggles with the question of the application of the new exemption provisions to obligations created before the new Act. It notes its concern with constitutional problems and it also greets with obvious relief the possibility of construing the Act as being only prospective in its operation. It then quickly pursues the latter route in order to avoid any constitutional issue.

I understand and can sympathize with the Court's desire thus to resolve the case. It is usually much easier to construe a statute so as to avoid a constitutional issue than it is to resolve the constitutional issue itself. And, of course, the Court's cases have announced that, where feasible, this is the preferred method. See, *e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978).

Were we writing on a "clean slate," however, I would not pursue, in this case, that principle of construction-preference, for I think that the case would deserve consideration in greater depth. I see nothing in the statute with which we are concerned that speaks or hints of only prospective applicability, or that compels it, and I would find it necessary to reach the constitutional issue. I would then resolve that issue in favor of the debtor and against the small loan company creditor. I would do so because the exemptions in question are limited as to kinds of property and as to values; because the amount loaned has little or no relationship to the value of the property; because these asserted lien interests come close to being contracts of adhesion; because repossessions by small loan companies in this kind of situation are rare; because the purpose of the statute is salutary and is to give the debtor a fresh start with a minimum for necessities; because there has been creditor abuse; because Congress merely has adjusted priorities, and has not taken for the Government's use or for public use; because the exemption provisions in question affect the remedy and not the debt; because the security interest seems to have little direct value and weight in its own right and appears useful mainly as a convenient tool with which to threaten the debtor to reaffirm the underlying obligation; because the statute is essentially economic regulation and insubstantial at that; and because there is an element of precedent favorable to the debtor to be found in such cases as *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

But we are not writing on a clean slate. It seems to me that the case of *Holt v. Henley*, 232 U.S. 637, 34 S.Ct. 459, 58 L.Ed. 767 (1914), is precisely in point and, unless the Court chooses to overrule it, must control the present case. There, Holt and the eventual bankrupt signed an agreement in 1909 for the installation of an automatic sprinkler system on the property of the eventual bankrupt. The agreement specified that the system was to remain Holt's property until paid for and that he was to have a right to enter and remove it upon

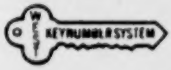
failure to pay as agreed. Thereafter, but also in 1909, a mortgage deed was executed covering the plant and what was "acquired and placed upon the said premises during the continuance of this trust." *Id.*, at 639, 34 S.Ct., at 459. Section 8 of the Act of June 25, 1910, ch. 412, 36 Stat. 840, amended § 47a(2) of the then Bankruptcy Act to give the trustee in bankruptcy, as to property coming into the custody of the bankruptcy court, the rights of a creditor holding a lien. Upon Holt's debtor's bankruptcy, the mortgagees claimed the sprinkler system.

Justice Holmes, writing for a unanimous Court, observed that before the amendment "Holt had a better title than the trustees would have got" and that the Court was of the opinion "that the Act should not be construed to impair it." 232 U.S., at 639, 34 S.Ct., at 460. He went on:

> "We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. It is enough that the reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed.... That is a familiar and natural mode of interpretation.... We are of opinion that [Holt's title] was not affected by the enactment of later date than the conditional sale. The opposite construction would not simply extend a remedy but would impute to the Act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start." *Id.*, at 639-640, 34 S.Ct., at 460.

The Court then ruled against the claim of the mortgagees because they had made no advance on the faith of the sprinkler system and were not purchasers for value as against Holt, and because removal "would not affect the integrity of the structure on which the mortgagees advanced." *Id.*, at 641, 34 S.Ct., at 460.

Holt v. Henley thus also involved a preexisting agreement, a subsequent change in the then Bankruptcy Act, and the Court's preservation of the pre-existing right. I see no way to distinguish that case from this one, and I would affirm the judgment of the Court of Appeals simply on the compelling authority of *Holt v. Henley*. See also *Auffm'ordt v. Rusin*, 102 U.S. 620, 622, 26 L.Ed. 262 (1881). I would much prefer to avoid in this way the dicta the Court enunciates with respect to "takings."



Ted W. BROWN et al., Appellants

v.

SOCIALIST WORKERS '74 CAMPAIGN COMMITTEE (OHIO) et al.

No. 81-776.

Argued Oct. 4, 1982.

Decided Dec. 8, 1982.

A class action was brought in the United States District Court for the Northern District of Ohio, challenging the constitutionality of the disclosure provisions of the Ohio Campaign Expense Reporting Law. Following issuance of a temporary restraining order, the case was transferred to the United States District Court for the Southern District of Ohio where a three-judge court concluded that the disclosure requirements were unconstitutional as applied to the Socialist Workers Party. Defendants appealed. The Supreme Court, Justice Marshall, held that the disclosure provisions of the Ohio law could not constitutionally be applied to the Socialist Workers Party since the First Amendment prohibits a state from compelling disclosure by minor political parties that would subject those persons identified to the reasonable probability of threats, harassment, or reprisals.

Affirmed.

Justice Blackmun filed opinion concurring part and concurring in the judgment.

duct a *de novo* hearing on Veteto's sup-ssion motion.

n view of our disposition of these issues, appellants' convictions are

AFFIRMED.

IRST NATIONAL BANK & TRUST COMPANY, Plaintiff-Appellee,

v.

Joseph Robert DANIEL, Defendant-Appellant.

No. 82-8176
Non-Argument Calendar.

United States Court of Appeals, Eleventh Circuit.

March 21, 1983.

Appeal was taken from a judgment of United States District Court for the ddle District of Georgia, Wilbur D. Ow-, Jr., Chief Judge, in favor of bank seek- to fix lien on debtor's office equipment, rnishings and law books. The Court of peals held that installment note repre-ted no fresh advance and was collateral-d with same property conveyed in two or security agreements between debtor d bank, and thus did not constitute a vation of the prior notes, but was merely renewal and consolidation of those notes; erefore, even though installment note s dated after effective date of Bankrupt-Reform Act, debtor could not avoid fix- of bank's lien on his office equipment, rnishings and law books under section 2(f) of the Bankruptcy Reform Act.

Affirmed.

Bankruptcy ⇐6
Novation ⇐4

Installment note represented no fresh advance and was collateralized with same property conveyed in two prior security agreements between debtor and bank, and thus did not constitute a novation of the prior notes, but was merely a renewal and consolidation of the two notes; therefore, even though installment note was dated after effective date of Bankruptcy Reform Act, debtor could not avoid fixing of bank's lien on his office equipment, furnishings and law books under section 522(f) of the Bankruptcy Reform Act. Bankr.Code, 11 U.S.C.A. § 522(f).

L.Z. Dozier, Macon, Ga., for defendant-appellant.

Arthur L. Phillips, Macon, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before RONEY and CLARK, Circuit Judges, and GIBSON *, Senior Circuit Judge.

PER CURIAM:

By a security agreement dated March 29, 1978, appellant Daniel conveyed a boat and boat trailer to First National Bank and Trust Company in Macon, Georgia, as collateral for a promissory note, dated January 30, 1978, in the amount of $9,000. By another security agreement dated May 19, 1978, appellant conveyed office equipment, furnishings, and law books to the bank as collateral for an $8,000 note, dated May 1, 1978, and due 91 days thereafter. On August 28, 1980, appellant and the bank executed a 48-month installment note in the principal amount of $14,196.43. This note represented no fresh advance and was collateralized with the same property conveyed in the security agreements dated March 29, 1978, and May 19, 1978.

Honorable Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

The issue in this case is whether the appellant debtor may avoid the fixing of the bank's lien on his office equipment, furnishings, and law books under section 522(f) of the Bankruptcy Reform Act of 1978. 11 U.S.C.A. sec. 522(f) (1979).

If the relevant note postdated the Act's effective date, October 7, 1979, the debtor would have this power. However, the district court correctly concluded that the note dated August 28, 1980, did not constitute a novation of the note dated May 1, 1978, which accompanied the security agreement covering appellant's professional books and equipment. "A simple contract regarding the same matter and on no new consideration, does not destroy another between the same parties . . ." Ga.Code Ann. sec. 20–115 (1977). "A new note given in lieu of an existing note between the same parties and for the same indebtedness, even at a higher rate of interest and due at a later date, is not given for a new consideration, and, therefore, does not constitute a novation." *Citizens & Southern National Bank v. C.E. Scheider*, 139 Ga.App. 475, 228 S.E.2d 611 (1976); *Northwest Acceptance Corp. v. Heinecke Instruments Co.*, 441 F.2d 887, 892 (5th Cir.1971). Therefore, although the note dated August 28, 1980, did extend the debtor's repayment period, it did not constitute a novation; rather, it was merely a renewal and consolidation of the two notes dated January 30, 1978, and May 1, 1978. *See King v. Edel*, 69 Ga.App. 607, 26 S.E.2d 365 (1943).

The Supreme Court has recently concluded that section 522(f) is not retroactive from November 6, 1978, its date of enactment. *United States v. Security Industrial Bank*, — U.S. —, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982). Thus, the appellant debtor cannot avoid the bank's lien created in 1978.

AFFIRMED.

Fred L. AHERN, A.L. Outlaw, Plaintiffs-Appellants,

v.

BOEING COMPANY, a foreign corporation, Defendant-Appellee.

No. 82–3001
Non-Argument Calendar.

United States Court of Appeals, Eleventh Circuit.

March 25, 1983.

In a suit for tortious interference with contracts, summary judgment was granted to defendant by the United States District Court for the Middle District of Florida at Jacksonville, Susan H. Black, J., 539 F.Supp. 1210, and plaintiff appealed. The Court of Appeals, Kravitch, Circuit Judge, held that motivation is not the guiding star in constellation of Florida's common law of tortious interference, and although mere self-interest and competitive solicitation will not constitute tortious interference with at-will contract, so long as third party does not induce breach of or interference with that existing contract, the fact that defendant was motivated only by competitive interests and that interference was with at-will contract did not preclude existence of cause of action against defendant corporation which actually entered into contract interfering with existing at-will contract of the plaintiff.

Reversed and remanded for trial.

1. Torts ⇐10(1)

Under Florida law, to establish cause o action for tortious interference, party mu demonstrate existence of advantageo business relationship under which that pa ty has legal rights, intentional and unjus fied interference with that relationship l defendant, and damage to plaintiff resu ing.

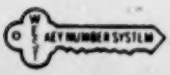
but that all expenses incurred until that point which remained unpaid would be reimbursed by a loan from the Bank to the debtor.

We agree with the Bankruptcy Judge's understanding of the relationship of the parties, and we reject the Bank's contention that by terminating the first agreement it was able to avoid liability for debts incurred while that agreement was in effect. *See generally* 6 *Corbin on Contracts* § 1266 (1951) (exercise of termination clause operates prospectively only). We know of no authority or equitable ground upon which the Bank should be allowed to retroactively and unilaterally avoid liability to the Appellees who shipped goods to the Debtor in reliance on an outstanding and unambiguous court order.

[2] The Bank's argument that the stipulation approved on March 30, 1981 terminated their liability is also rejected. The stipulation did purport to abrogate the September 12, 1980 order by providing that "[t]he September 12, 1980 Findings of Fact and Order are null and void and of no further force and effect except as expressly provided hereinafter." This disclaimer fails in its attempt to nullify the agreement and order in effect when the Appellees delivered the supplies in question, for the same reasons stated above.

Additionally, although the Debtor assented to the March 30, 1981 stipulation, the Appellees did not, and their right to payment under the September agreement was not altered by the March 1981 order approving the stipulation.

The order of the Bankruptcy Court is affirmed.



In re Thelma Gertrude WHITE, Debtor.

Thelma Gertrude WHITE, Plaintiff, Appellee,

v.

Albert J. GULESIAN, Sr., Defendant, Appellant.

Bankruptcy No. 82-9045.

United States Bankruptcy Appellate Panel for the First Circuit.

Dec. 17, 1982.

An appeal was taken from an order of the Bankruptcy Court allowing debtor to avoid a judicial lien, which impaired her exemption, placed on debtor's property prior to enactment of the Bankruptcy Act of 1978. The Bankruptcy Appellate Panel held that bankruptcy statute enabling a debtor to avoid fixing of a judicial lien on an interest of debtor in property to extent that such lien impairs debtor's exemption would not be applied retroactively to allow debtor to avoid a judicial lien placed on debtor's property prior to enactment of Bankruptcy Act of 1978.

Reversed.

1. Bankruptcy ⇐6

When a bankruptcy statute affects a property right, it should not be applied retroactively unless the legislature has so directed in unequivocal terms.

2. Bankruptcy ⇐6

Bankruptcy statute enabling a debtor to avoid fixing of a judicial lien on an interest of debtor in property to extent that such lien impairs debtor's exemption would not be applied retroactively to allow debtor to avoid a judicial lien placed on debtor's property prior to enactment of Bankruptcy Act of 1978. Bankr.Code, 11 U.S.C.A. § 522(f)(1).

Charles E. Gilbert, III, Bangor, Me., for defendant, appellant.

Norman S. Heitmann, Millinocket, Me., for plaintiff, appellee.

PER CURIAM:

Appellant argues that 11 U.S.C. § 522(f)(1)[1] should not be applied retroactively to allow the debtor/appellee to avoid a judicial lien, which impairs her exemption, placed on the debtor's property prior to the enactment of the Bankruptcy Act of 1978.[2]

[1, 2] In *United States v. Security Industrial Bank*, — U.S. —, 102 S.Ct. 1965, 72 L.Ed.2d 437 (1982), the Supreme Court held that § 522(f)(2) was not intended to be applied retroactively. When a bankruptcy statute affects a property right, it should not be applied retroactively unless the legislature has so directed in unequivocal terms. *Id.* The Supreme Court found that the legislative history of the 1978 Act suggested that Congress did not intend that § 522(f) operate to destroy pre-enactment property rights. Although the *Security Industrial Bank* case concerned a non-possessory non-purchase money security interest, the same rationale would apply to a judicial lien perfected prior to the Act's enactment due to the absence of such Congressional intent.

The decision of the bankruptcy court is reversed.

1. 11 U.S.C. § 522

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien;

2. The judicial lien was placed on the debtor's real estate on April 14, 1978. The Bankruptcy Act of 1978 was signed into law by the President on November 6, 1978.

In re ATCORP I, INC., and ATCORP II, Inc., Debtors.

ATCORP I, INC., and ATCORP II, Inc., Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE, Appellee.

Bankruptcy No. 82-9031.

United States Bankruptcy Appellate Panel for the First Circuit.

Dec. 23, 1982.

Appeal was taken from order of the Bankruptcy Court modifying plan to provide that secured claim of ship mortgagee would be paid in cash in full after confirmation. The Bankruptcy Appellate Panel, Lavien, J., held that ship mortgagee was not entitled to interest on insurance proceeds paid for loss of vessel.

Order vacated.

1. Bankruptcy ⇐446(8.1)

Finding of fact by bankruptcy court ordinarily cannot be reversed unless clearly erroneous. Rules Bankr.Proc. Rule 752, 11 U.S.C.A.; U.S. Ct. of App. 1st Cir.App.II, Rules 16, 28 U.S.C.A.

2. Stipulations ⇐14(10)

Limitation on recovery of insurance proceeds by ship mortgagee as contained in breach of warranty clause of hull policy did not apply since parties stipulated that vessel sank as a result of insured peril under policy.

3. Bankruptcy ⇐446(8)

While the Bankruptcy Appellate Panel must accept findings of fact made by bank-